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No. 179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953

CECIL L. COURTNEY, PHILIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS, AND BRIEF IN SUPPORT OF PETITION.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
Attorney for Petitioners.

KANSAS LAW PUB. CO., TOPEKA

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.....

CECIL L. COURTNEY, PHILIP T. FERRIS,
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PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

These were original applications for writs of habeas corpus brought in the Supreme Court of the State of Kansas, by petitioners herein, and consolidated for hearing, which alleged petitioners were unlawfully imprisoned

and restrained by Ty Lockett, sheriff and respondent herein, pursuant to judgments and sentences by the District Court of Sedgwick County, Kansas, for direct contempt of said District Court at a judicial inquisition proceeding allegedly authorized by the laws of said state. The applications were denied (Tr. p. 65-19; App. B, p. 61) and petitioners moved for rehearing of the said application. That motion was also denied. (Tr. p. 74)

The principal questions involved in said applications were:

1. Whether the said District Court had jurisdiction to render the judgments and impose the sentences for direct contempt of court in the said inquisition proceedings in camera, and without affording petitioners an opportunity to confer with counsel prior to the judgments and sentence.

2. Whether the privileges and immunities extended to the petitioners by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were abridged by the judgments, sentences and imprisonment.

3. Whether the inquisition proceedings at which petitioners were adjudged guilty of direct contempt of court were valid under the laws of the State of Kansas.

The foregoing questions were determined adversely to the petitioners by the Supreme Court of Kansas in the original proceedings in habeas corpus brought therein.

II. JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under section 1257 of Title 28 of the United States code. The judgment of the Supreme Court of Kansas is a final judgment, rendered on March 3, 1954, and the said court is the highest court of the state in which a decision in these cases could be had. Petitioners' motions for rehearing were denied on April 14, 1954. There were specially set up and claimed under the Constitution of the United States rights, privileges and immunities of the petitioners.

The stages in the proceedings in the said Supreme Court of Kansas, which was the court of first instance, at which, and the manner in which, the federal questions sought to be reviewed, were raised, are as follows:

1. By the applications for writs of habeas corpus filed by petitioners in said Supreme Court of Kansas. (Tr. pp. 3, 7, 9; App. B, pp. 35, 37, 39)

2. By briefs and oral argument as reflected in the opinion filed by the said Supreme Court of Kansas. (Tr. p. 65; App. p. 43)

The manner in which the federal questions sought to be reviewed were passed upon by the court was as follows, where is was held that:

1. The constitutional guaranties relied upon by petitioners apply only to criminal prosecutions. (Tr. 65-9; App. D, p. 53)

2. There was no violation of constitutional provisions where petitioners were accused of contempt, tried, convicted and sentenced without formal charges

preferred against them, and without evidence or counsel. (Tr. p. 65-11; App. D, p. 54.)

3. The secrecy in which the inquisition was conducted does not violate constitutional provisions which apply only to criminal prosecutions, as petitioners had not been accused of committing any crime. (Tr. p. 65-12; App. D, p. 55.)

III. QUESTIONS PRESENTED.

1. May witnesses in a secret judicial inquisition proceeding be accused of direct contempt, tried, sentenced and committed to jail in the same secret proceeding without interruption of the secrecy?

2. Does the failure to afford such witnesses an opportunity to confer with counsel, and to purge or defend themselves, when they stand accused of direct contempt for their refusal to reply to questions to which they have raised objections, at a judicial inquisition conducted in secrecy, constitute a denial of due process of law?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The decision of the Supreme Court of Kansas is probably not in accord with applicable decisions of this court.

2. The decision of the Supreme Court of Kansas is in conflict with the decision of this court, on the same or similar matters, in the case of *Re William Oliver*, 333 U. S. 257. (March 8, 1948)

Wherefore, your petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Kansas, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of the said court had in the consolidated cases numbered and entitled on its docket, No. 39,454, In the Matter of the Application of Cecil L. Courtney for a Writ of Habeas Corpus; No. 39,455, In the Matter of the Application of Phillip T. Ferris for a Writ of Habeas Corpus; and No. 39,459, In the Matter of the Application of Ray Parks for a Writ of Habeas Corpus, to the end that the errors aforesaid may be corrected by this court:

Dated.....1954.

_____Attorney for Petitioners.

PAYNE H. RATNER,
444 N. Market,
Wichita, Kansas.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953

No.....

CECIL L. COURTNEY, PHILLIP T. FERRIS, AND RAY PARKS,
PETITIONERS BELOW,

vs.

TY LOCKETT,
RESPONDENT BELOW.

BRIEF OF PETITIONERS.

I. OPINION OF COURT BELOW.

The opinion of the Supreme Court of Kansas (Tr. p. 65) is reported in volume 175 at page 704 of The Kansas Reports, and appended hereto as Appendix D.

II. JURISDICTION.

1. The date of the decree to be reviewed is March 3, 1954, rehearing denied, April 14, 1954. (Tr. p. 65, Syl. 4, p. 4)

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 1257 of Title 28 of the United States Code.

3. The judgment of the Supreme Court of Kansas is a final judgment and the said court is the highest court in the state in which a decision in these cases could be

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had; petitioners' motions for rehearing were denied. Rights, privileges and immunities of the petitioners under the Constitution of the United States were specially set up and claimed in petitioners' original applications for writs of habeas corpus in the said court and in their briefs and oral arguments in the said court.

4. The cases believed to sustain said jurisdiction are as follows:

Coleman v. Miller, 307 U. S. 433.
Garrett v. Moore-McCormick, 317 U. S. 239, pp. 245, 246.
McNabb v. U. S., 318 U. S. 332, p. 340.

III. STATEMENT OF THE CASE.

This has already been stated in the preceding and annexed petition for certiorari under par. I, p. 1 of said petition, which is hereby adopted and made a part of this brief.

IV. SPECIFICATIONS OF ERRORS.

The Supreme Court of Kansas erred in holding that:

1. There were no violations of the due process clause of the Fourteenth Amendment to the Constitution of the United States, where the petitioners were accused of contempt, tried, convicted and sentenced without formal charges preferred against them, and without evidence or counsel.

2. There was no violation of the Fourteenth Amendment to the said Constitution, where petitioners were tried, convicted and sentenced to jail for contempt, as a

secret inquisition proceeding, for the reason that petitioners had not been accused of any crime.

ARGUMENT.

Summary of the Argument.

Point A: The accusation, trial, conviction and commitment to jail of witnesses called to testify at a secret judicial inquisition proceeding, for contempt of the judicial officer conducting such proceeding, where the inquisition and subsequent trial and conviction were conducted in absolute secrecy, constitutes an abridgement of the right to a public trial of such accused witnesses and deprives such witnesses of their liberty without due process of law in contravention of the Fourteenth Amendment to the Constitution.

Point B: The failure to afford such accused witnesses an opportunity to confer with counsel, or defend themselves, when they stand accused of direct contempt of a judicial inquisitor, or to purge themselves after they were convicted in such secret proceeding, for their refusal to reply to questions to which they had interposed objections, constitutes an abridgement of the right to assistance of counsel for the defense of such accused witnesses, and denies such accused witnesses procedural due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

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Point A.

Petitioners submit that their accusation, trial, conviction and commitment to jail for contempt of court, in a proceeding conducted *in camera* was a denial of their right to a public trial and a denial of procedural due process of law.

The petitioners were taxicab drivers, and were members of a union called out on strike; certain acts of violence had occurred and an inquisition, allegedly pursuant to Kansas Law[1], was initiated by the county attorney, who filed a Statement and Request for Inquisition in the District Court of Sedgwick County. (Tr. p. 17, Ex. "E")

The petitioners were subsequently served with "forthwith" subpoenas (the petitioner Ferris was arrested on a bench warrant and held incommunicado for six hours prior to being brought before the inquisition) (Tr. p. 37), and they were compelled to testify at the inquisition. The proceeding was conducted in complete secrecy. The public, press and counsel were excluded. Upon the refusal of petitioners to answer certain questions propounded by "special volunteer" deputy county attorneys and the judge, before whom the proceedings were being conducted, (Tr. pp. 20-7, 21-55, 22-11a) the petitioners were accused of direct contempt of court, adjudged guilty and sentenced to jail. Ferris and Parks were each sentenced to terms of one year, and Courtney was sentenced to 90 days. (Tr. pp. 20-7, 21-55, 22-11a). They were

1. Appendix A, p. 31.

committed to the custody of the respondent, Sheriff of Sedgwick County, for confinement pursuant to the sentences.

Original applications for writs of habeas corpus[2] were filed in the Supreme Court of the State, and were denied, which ruling is now sought to be reviewed by certiorari.

Petitioners submit that the proceeding at which they were accused and convicted of contempt, and at which they were sentenced and committed to the custody of respondent for confinement in jail deprived them of their liberty without affording them the notice, opportunity to defend themselves or a public trial as required by the due process clause of the Fourteenth Amendment.

The case of *Re William Oliver*, 333 U. S. 257, in which writ of certiorari to the Supreme Court of Michigan was issued, is closely analogous upon its facts to the instant case. In the cited case petitioner had been convicted and sentenced in secrecy for contempt of a judge sitting as a "one man grand jury" under the Michigan procedure. The Supreme Court of that State denied a petition for a writ of habeas corpus, and certiorari followed. The petitioner in the cited case contended that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chambers had deprived him of his liberty without affording him an opportunity to defend himself, or a trial as required by the due process clause of the Fourteenth Amendment. The cited

2. Appendix B, p. 34; Tr. pp. 3, 7, 9.

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case and the instant case are distinguishable only upon the basis of the differences in terminology of the Michigan Statute, 3 Mich. Comp. Laws of 1929, sec. 17217, et. seq.[3], and the Kansas Statute, G. S. of Kansas, 1949, Sec. 62-3014; and the circumstance that the petitioner in the cited case was committed for contempt for giving false and evasive answers to questions propounded by a circuit judge sitting as a "one man grand jury"; whereas, in the instant cases, petitioners were committed for refusing to answer certain questions propounded by a district judge and deputy county attorney in an inquisition proceeding. In both the instant and cited cases, petitioners were accused of contempt and convicted summarily, *in camera*, upon their refusal to respond satisfactorily to questions propounded by judicial inquisitors, and summarily sentenced to confinement by the same judicial interrogators, without interruption of the secrecy and without being afforded notice or given an opportunity to confer with counsel. In the instant cases petitioners were not even afforded an opportunity to purge themselves of the alleged contempt.

In the *Oliver Case, supra,* this court in its opinion written by Justice Black, said, loc. cit. 264:

> "Many reasons have been advanced to support grand jury secrecy. See e. g., Hale v. Henkel, 201 U. S. 43 . . . State v. Branch, 68 N. C. 186 . . . But those reasons have never been thought to justify secrecy in the trial of an accused charged with

3. Appendix C, p. 41.
4. Appendix A, p. 31.

violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict . . . Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case."

The Supreme Court of Kansas, said in its opinion[5], in the instant cases:

"Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended that the inquisition should be held in secret. We shall not burden the opinion with a lengthy discussion of the subject. There is nothing in the present statute which in anywise indicates a public hearing is contemplated. Proceedings before grand juries and similar investigative bodies seldom if ever have been conducted publicly. The reasons are clear . . . Constitutional provisions which require that an accused be permitted to meet witnesses face to face apply only to criminal prosecutions and not to mere investigative proceedings. Petitioners had not been accused of any crime."

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5. Appendix D, p. 54; Tr. p. 65-11.

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The Kansas Statute, G. S. 1949, 62-3016, under which the inquisition was conducted, provides in pertinent part, as follows:

> "A judge . . . may fine, or imprison any person for contempt on account of his refusal . . . to answer questions as a witness."

The above quoted portion of the statute clearly places any person subpoenaed to testify as a witness in an inquisition proceeding in the position of an accused, *upon his refusal to testify.* This point was urged upon the court below in petitioners' briefs and oral arguments, but the court ignored the transition of the status of petitioners from witnesses to accused in its opinion, and held that "Petitioners had not been accused of any crime."[7] The proceeding which resulted in the confinement of the petitioners was not only conducted in secrecy during their interrogation, but continued to be cloaked in secrecy after they refused to testify. No one, except the judicial and law enforcement officers present at the proceeding, had knowledge of the events which culminated in the convictions and commitments of the petitioners to jail. The petitioners stood alone before their inquisitors, accused of direct contempt, behind locked doors and in the presence only of officers of the court whose interests in the minds of the petitioners were inimically opposed to theirs, and were thus convicted and committed to jail.

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6. Appendix A, p. 32.
7. Appendix D, p. 55; Tr. p. 65-12.

In 14 Am. Jur. 864, Sec. 139, it is said:

> "The right to a public trial on a criminal charge is guaranteed by the Federal Constitution and by the Constitution of several states. The necessity for such a provision arose from abuses in England prior to the American Revolution, and its purpose manifestly is to protect the rights of a person accused of a crime, so that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function."

In an English case, *Scott v. Scott*, 30 Ann. Cas. 1913 E 614, (1913) A. C. 417 (House of Lords, 1913), Lord Shaw, on this point, observed, *loc. cit.* p. 634:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial' . . . But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten! 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair construction of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain re-

> dress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy real freedom, where this condition is not found both in its judicial institution and in their constant exercise'."

The summary manner in which petitioners were convicted and the severity of the punishment inflicted raises the implication that the proceeding was punitive in character, rather than investigative. No opportunity to purge themselves of the alleged contempt was extended by the order committing petitioners to jail. Justice Smith, dissenting from the majority opinion of the Supreme Court of Kansas in the instant case[8], said:

> "A persuasive incident to me is that when these men were sentenced, in one case to three months, and in the other cases to a year in the county jail, the sentences were not in the alternative that they should purge themselves of contempt, but were direct sentences to that much of a term in the county jail.
>
> "The entire affair was punitive and not in the interest of obtaining evidence. Had the investigation been carried on in good faith the sentences would have been, petitioners should be confined in the county jail for the terms indicated or until they should purge themselves of contempt."

The question of whether the due process clause of the Fourteenth Amendment extended the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ." to apply to a trial of a criminal prosecution

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8. Appendix D, p. 63; Tr. p. 65—Dissent, p. 3.

by a state, was first raised in *Gaines v. State of Washington*, 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468 (1928). In considering the question, but not passing upon it, Chief Justice Taft said in his opinion, *loc. cit.* 85:

> "It is contended, however, that due process of law exacted in the Fourteenth Amendment in causes tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials. The question has not arisen in any case cited to us. It would involve a consideration of whether due process requires more than a trial that is not private or secret, or whether due process would not be satisfied except by such a restriction upon the discretion of the court in regulating attendance as the defendant here insists upon and as is held in some of the authorities cited above in enforcing the Sixth Amendment and similar constitutional provisions of an affirmative character. But we need not pass on that question now."

The question was again before this court in *Re William Oliver, supra;* and in deciding it, Justice Black said, *loc. cit.* p. 273:

> "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison."

It is respectfully submitted that, in view of the foregoing, petitioners were and are deprived of their liberty without the due process of law guaranteed to them by

the Fourteenth Amendment, by virtue of their accusation, trial, conviction and commitment to jail in secrecy. Certiorari should therefore issue to the Supreme Court of Kansas for the purpose of correcting the errors specified herein in the decree of that court denying the applications for writs of habeas corpus of the petitioners.

Point B.

Petitioners submit that the failure to afford them an *opportunity* to confer with counsel, or to defend themselves when they stood accused of direct contempt, or an opportunity to purge themselves after they were convicted, was a denial of the procedural due process of law guaranteed to them by the Fourteenth Amendment.

In its opinion[9] in the instant case, the Supreme Court of Kansas said:

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel."

The opinion goes on to comment that petitioners failed to observe the distinction between indirect and direct contempt as provided by the statutes of Kansas, and cites G. S. 1949, 20-1203, which provides:

> "That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers

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9. Appendix D, p. 56; Tr. p. 65-14.

> shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon."

It should be noted that the statute above quoted contemplates an arraignment of the person accused of direct contempt. The arraignment of a prisoner consists of calling upon him by name, and demanding of him whether he be guilty or not guilty, and entering his plea, *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Black's Law Dictionary, 3rd Ed. p. 140. The record fails to disclose conformance by the judicial officer conducting the inquisition with the statute in that respect.

While an arraignment is a formal preliminary step to the trial of an accused, the minimum requisites of the trial to which an accused is entitled is a fair and open hearing, assistance of counsel, notice of the charge against him, and an opportunity to be heard in his defense, and it has been held these rights are fundamental in our system of jurisprudence. *Re William Oliver*, supra; p. 273; *Snyder v. Massachusetts*, 291 U. S. 97, p. 116, 54 S. Ct. 330, 78 L. Ed. 624, 90 A. L. R. 575; *Powell v. Alabama*, 287 U. S. 45, pp. 68-70, 53 S. Ct. 55, pp. 63, 64, 77 L. Ed. 158, 84 A. L. R. 527; *Morgan v. U. S.*, 304 U. S. 1, pp. 14, 15, 58 S. Ct. 773, pp. 774, 775, 82 L. Ed. 1129, and cases therein cited.

In the instant case the Supreme Court of Kansas, in its opinion held that direct contempts pursuant to the

quoted section of the statute, might properly be treated *summarily*. It was said[10]:

> "Here we are concerned only with direct contempt of court committed in the presence of the presiding judge who had personal knowledge of exactly what transpired."

As authority for the ruling the court below cited *Savin, Petitioner*, 131 U. S. 267, 33 L. E. 150, 9 S. Ct. 699; and *Cooke v. United States*, 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390. In both of the cited cases the contemner was proceeded against *in open court*. In the *Savin* case, the accused was represented by counsel. In the *Cooke* case, the accused was an attorney practicing before the court. In the latter case, this court said, *loc. cit.* 537:

> "The court in Savin, Petitioner, . . . applied this rule to proceedings for contempt.
>
> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. *We think this includes the assistance of counsel, if requested*, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed . . . " (Emphasis supplied.)

In *Re William Oliver, supra*, this Court discussing the earlier case of *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405, said, loc. cit. 274:

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10. Appendix D, p. 58; Tr. p. 65-16.

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry . . . was such a case. There Terry committed an assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye', and actually interrupted the trial of a cause there under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing . . . This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat 204, 5 L. Ed. 242, which had marked the limits of contempt authority in general as being "the least possible power adequate to the end proposed."

It is submitted that in the instant cases the direct contempt for which the petitioners were committed summarily to jail was not in open court, nor did the alleged contemptuous conduct disrupt or demoralize the court, if the inquisition proceeding may be properly styled a "court". It cannot be denied that at the time petitioners were warned that their continued refusal to testify would result in punishment for con-

tempt, they were without counsel, as the record clearly shows that all of them objected to testifying without counsel (Tr. pp. 20-2, 22-11A). The record also discloses that at least one of the petitioners had counsel available, as a letter from such counsel was presented to the officials conducting the inquisition (Tr. pp. 22-2, 18-Ex. "A"). It may be fairly inferred from those facts that counsel for petitioners were denied access to the inquisition proceeding. It is undisputed that counsel were not present when petitioners were summarily sentenced to jail. Had petitioners been allowed to confer with counsel at an arraignment preliminary to their trial and sentence, and receive advice as to the possible consequences of their continued refusal to testify, by counsel of their choice, they might well have purged themselves of the alleged contempt, or at least offered explanations in mitigation of their offenses. No such opportunity was afforded the petitioners, nor were their sentences conditioned upon the withdrawal of their refusals to testify, after they might have had an opportunity to confer with counsel. As Justice Smith said in his dissent, "The entire affair was punitive . . . "[11].

The Supreme Court of Kansas, in its opinion[12] with reference to petitioners' contention that they were deprived of counsel, said:

> "Petitioners assert the inquisition as conducted violated the fifth, sixth and fourteenth amendments

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11. See p. 15, ante.
12. Appendix D, p. 51; Tr. p. 65-7.

to the federal constitution and section ten of the Kansas bill of rights.

"• • • • •

"The Sixth Amendment, insofar as material, provides: 'In all *criminal prosecutions,* the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense. (Our italics.)'

"The essential part of the fourteenth amendment states: ' . . . No state shall make or enforce any law which shall *abridge the privileges and immunities* of any citizen of the United States; nor shall any state deprive any person of life, liberty or property, *without due process of law.* (Our italics.)'

"• • • • •

"Petitioners contend they were deprived of counsel in contravention of the sixth amendment to the federal constitution. From an examination of the record it well may be debatable whether any of them actually demanded or requested counsel. They did, however, object to testifying on the ground they were without counsel. We have indicated previously (1) the sixth amendment does not apply to state statutes and (2) this inquisition was a preliminary investigative proceeding to uncover crime and was not a criminal prosecution.

"It is well settled an investigation of crime by a grand jury is not a criminal prosecution . . . This court has likewise held a preliminary hearing in a felony case does not fall within the definition of a criminal prosecution and that absent a statutory requirement, a defendant's rights are not invaded without the appointment of counsel for such hearing . . . "

The court below apparently dismissed petitioners' contentions with respect to the denial of counsel on the

following grounds; first, there had been no demand or request for counsel; second (after petitioners objected to testifying without counsel), the Sixth Amendment does not apply to state statutes; third, the inquisition proceeding was investigative and not a criminal prosecution; fourth, a preliminary hearing in a felony case is not a criminal prosecution; and fifth, a defendant's rights are not invaded absent the appointment of counsel for a preliminary hearing in a felony case.

It may be fairly argued that the grounds above recited are contradictory and irrelevant. The first basis for disregarding petitioners' contention is negated by the reference to petitioners' objection in the second; the second ground does not take into consideration the application of the due process clause of the Fourteenth Amendment; the third ground ignores the undisputed fact that petitioners were convicted of an offense and sentenced to jail; the fourth is entirely irrelevant; and the fifth presupposes, apparently, a *request to appoint* counsel by petitioners. As stated previously, petitioners had counsel of their own choice ready and willing to assist them, as evidenced by the letter of counsel[13] previously referred to.

In the *Oliver* case, *supra*, this court said, *loc. cit.*, p. 275:

> "Except for a narrowly limited category of contempts, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel . . . The narrow exception to these due process requirements in-

13. See p. 21, ante.

> cludes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority . . . before the public'.
>
> " • • • • • •
>
> "The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice hearing and counsel. Since the petitioner's misconduct all occurred in secret there could be no possibility of a demoralization of the court's authority before the public . . ."

In all fairness it must be admitted that in the instant cases all of the elements of the offense were personally observed by the judge-inquisitor. However, it can be fairly argued that while the offense might be punishable as contempt by that officer in his capacity as judge in open court, to punish for contempt in a secret inquisition proceeding is an unlawful exercise of power by the inquisitor.

The Supreme Court of Kansas in the instant case repeatedly equated the inquisition proceeding to a grand jury investigation.[14] This court in the *Oliver* case, *supra*, said at pages 277, 278:

> "The traditional grand juries have never punished contempts. The practice that has always been followed with recalcitrant grand jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of the courts . . . The right to be heard

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14. Appendix D, pp. 52, 54; Tr. pp. 65-9, 65-11.

in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority'.

"It is the law of the land that no man's life, liberty or property be forfeited as punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v. Florida, 309 U. S. 227, 236, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716 . . . ."

It is submitted that the entire inquisition proceeding at which petitioners were convicted and sentenced to jail was so permeated with illegality that such convictions cannot be allowed to stand. The petitioners were deprived of their liberty without regard for the procedural due process of law guaranteed to them by the Constitution of the United States, in a proceeding repugnant to the ideas and processes of civil justice. The inquisition proceeding of Kansas, and the "one man grand jury" of Michigan, have been declared lawful by the highest courts of both jurisdictions; both procedures circumscribe the historical institution of the common-law grand jury. The limitation of that ancient institution is generally justified for reasons of economy and expediency. However, in Kansas, at least, the grand jury had always been available in a proper case, and prior to the instant decision, had been understood to be the proper agency to exercise general inquisitorial and investigative powers. As such, it constituted a method of discovery available to law enforcement officers, while giving co-extensive protection from unfounded and unjust accusations to the private citizen. Our ancestors were rightfully concerned with

that protection, and the institution of the grand jury was its principal bulwark. In 24 Am. Jur. 833, sec. 3, it is said:

> "The grand jury is of very ancient origin in the history of England going back many centuries . . . the grand jury was, at the time of the settlement of this country, an informing and accusing tribunal only . . . In the struggles which at those times arose between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against the oppression of unfounded prosecutions of the Crown . . . the grand jury was adopted here . . . and is designed as a means not only of bringing to trial persons accused of offenses upon just grounds, but also of protecting the citizens against unfounded accusation. Whether they come from the government or are prompted by partisan passion or private enmity."

In *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, this court has employed language indicative of the repugnance of dictatorial criminal procedure to the constitutional guaranties of procedural due process. At page 235, in the opinion by Justice Black, it was said:

> " . . . The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect at all times, people charged with or suspected of a crime, by those holding positions of power and authority. Tyrannical

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governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny . . . a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already 'by the law of the land forbidden' when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement . . . evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country . . . wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberty and property of people accused of a crime can only follow if procedural safeguards of due process have been obeyed.

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes . . . "

It is true that the language above quoted was taken from context of a land-mark opinion which dealt with the lives of four men. Whereas, in the instant matter we are concerned only with the deprivation of the liberty of the petitioners for relatively short periods of time in a fairly well-managed county jail. However, it is submitted that the language used in *Chambers v. Florida,* supra, could be applied with equal force and pertinency to the situation of the petitioners.

It is earnestly submitted that the denial of assistance of counsel to the petitioners when they stood accused of direct contempt of the judge-inquisitor, after their refusal to testify without counsel, was violative of the procedural due process required by the Fourteenth Amendment. The Supreme Court of Kansas suggested in its opinion that it was debatable whether petitioners demanded or requested counsel. It has already been pointed out that that suggestion is not consonant with the record.[15] Petitioners suggest that the speed with which the inquisition was transformed into a criminal prosecution, and the disregard of ordinary criminal procedure, did not permit petitioners to present a formal demand and request for the assistance of counsel prior to their sentences and commitment to jail.[16] That the right to assistance of counsel is a fundamental element of procedural due process was first determined by this Court in the case of *Powell v. Alabama, supra,* in its opinion delivered by Sutherland, J., wherein it was said, *loc. cit.* p. 67:

> " . . . While the question has never been categorically determined by this court, a consideration of the right and review of the expressions of this and other courts makes it clear that the right to aid of counsel is of this fundamental character."

It is emphasized that petitioners do not complain that the judge-inquisitor refused to appoint counsel for their assistance. The complaint is that they were denied counsel of their choice who were ready and willing to assist

15. See page 21, ante.
16. Transcript of the record, pp. 20-7, 21-55, 22-11A.

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them.[17] See *Betts v. Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252. Petitioners contend that the denial of assistance of counsel to persons accused of a criminal offense, where such persons desire counsel and are prepared to provide counsel, is a denial of procedural due process of law. See *Powell v. Alabama*, supra; *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 244, 56 S. Ct. 444, 446, 80 L. Ed. 660; *Brown v. Mississippi*, 297 U. S. 286, 56 S. Ct. 663, 80 L. Ed. 687.

CONCLUSION.

It is submitted that the accusation of contempt, trial, conviction, sentence, and commitment to jail of the petitioners, in a secret inquisition proceeding by a judge-inquisitor, without hearing, counsel or an opportunity to purge themselves of such contempt, constituted a denial to the petitioners of procedural due process of law as contemplated by the Fourteenth Amendment to the Constitution of the United States.

It is further submitted that the Supreme Court of the State of Kansas erroneously denied the applications of the petitioners for writs of habeas corpus, and erroneously ruled upon the rights, privileges and immunities conferred upon the petitioners by the Constitution of the United States, and raised by them in their said applications and upon the hearings thereof.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, by granting writ of certiorari and thereafter re-

17. See page 21, ante.

viewing and reversing the decision of the said Supreme Court of the State of Kansas.

Dated_____

_____Attorney for Petitioners.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas.

Service on counsel for respondent of a copy of above brief is hereby acknowledged this_____day of _____, 1954.

_____Attorney for Respondent.

APPENDIX A.

Chap. 62, G. S., 1949, Kan.

"Article 3. — INQUISITIONS IN CRIMINAL CASES.

"Cross references: Fugitives from justice, see ch. 62 art. 7. Combinations in restraint of trade, see Secs. 50-109, 50-110, 50-153 to 50-156.

"62-301. *Inquisitions; subpoena of witnesses; penalty for disobedience; immunity of witnesses.* If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him, at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state. Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county,

and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and returned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or any refusal to be sworn as a witness or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment. If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney

general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state. (R. S. 1923, s 62-301; Dec. 27.)

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF PHILLIP T. FERRIS FOR A WRIT OF HABEAS CORPUS. CASE No. 39454

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Phillip T. Ferris, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause of pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant or order of attachment for a period of hours, after which period and at or about 5:30 p. m. of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath. Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioner's refusal to answer certain questions propounded by the said Judge, the petitioner was sentenced to be confined in the County Jail of Sedgwick County,

Kansas, for the period of one year for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, in the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF CECIL L. COURTNEY FOR A WRIT OF HABEAS CORPUS. CASE No. 39455

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Cecil L. Courtney, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant, or order of attachment for a period of hours, after which period and at or about 5:30 p. m. of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath. Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioner's refusal to answer certain questions pro-

pounded by the said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for the period of one year* for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

* Errata in original application. Courtney was actually sentenced to 90 days.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify

to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

WHEREFORE, Your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF RAY PARKS FOR A WRIT OF HABEAS CORPUS — CASE NO. 39459

APPLICATION FOR WRIT OF HABEAS CORPUS

STATE OF KANSAS)
) SS
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Ray Parks, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 19, 1954, your petitioner was served with a forthwith subpoena issued by the District Court of Sedgwick County, Kansas, and was bodily taken by the servers thereof to the office of the County Attorney of Sedgwick County, Kansas, and was there held from the approximate time of 3:30 p. m. on said date until approximately 10 p. m., on said date, at which time petitioner was released and instructed by Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, to return to said court at 5:30 p. m. on January 20, 1954. That your petiitoner did appear be-

fore said Judge at said time and place and was held in the office of the County Attorney of Sedgwick County, Kansas, until approximately 6:30 p. m., on said 20th day of January, 1954, at which time your petitioner was brought before Judge Howard C. Kline, Judge of Division 2, of said District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special Deputy County Attorney of said County, after first being sworn upon oath. Upon your petitioner's refusal to answer questions propounded by said special County Attorney, interrogation was continued by the said Judge. Upon your petitioner's refusal to answer questions propounded by said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for a period of one year for contempt of the said court, and was held in the office of the County Attorney of said County until approximately 7:30 p. m., on January 20, 1954, at which time your petitioner was delivered into the custody of Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the County Jail of said county.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was subpoenaed under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special Deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons un-

authorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

IV. That your petitioner, although requesting permission to have advice of counsel, was denied by said Judge the right to counsel at all stages of said proceeding prior to petitioner's being found in contempt of said court as hereinbefore stated.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

APPENDIX C.

THE COMPILED LAWS OF THE STATE OF MICHIGAN, 1929

Chapter VII

Grand Juries, Indictments, Informations and Proceedings before Trial.

* * * * *

17217 Proceedings before Trial; summoning witness, inquiry, compensation. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

* * * * *

17218 Same; apprehension of suspected person, finding, disclosure of statement. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process

served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or public body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

* * * * *

APPENDIX D.

Advance Sheets of The Kansas Reports, Vol. 175, No. 5, pp. 704-719.

"No. 39,454

In the Matter of the Application of Philip T. Ferris for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

No. 39,455

In the Matter of the Application of Cecil L. Courtney for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

No. 39,459

In the Matter of the Application of Ray Parks for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

SYLLABUS BY THE COURT

1. *STATUTES — Construction — Legislative Purpose.* In interpreting a statute separate portions thereof may not be isolated and considered separately but all of its provisions must be considered together with a view of ascertaining the over-all legislative intent and purpose with respect to every provision.

2. *INQUISITIONS—Scope and Purview of Statute—Statute Construed.* G. S. 1949, 62-301 interpreted and held: It was not the legislative intent and purpose to limit the scope and purview of a judicial inquisition, conducted on request of and by the county attorney before the district court, to violations of law relating only to gambling, intoxicating liquors, or to violations of any law where the accused is a fugitive from justice, but its intent was that when the inquisition was conducted as a judicial proceeding rather than one by the county attorney, attorney general, or assistant attorney general, then inquiry could be made relative to "any offense against the laws of the state."

3. *SAME — Judicial Inquisition Not Criminal Prosecution—Purpose.* An inquisition authorized and conducted as a judicial proceeding in accordance with provisions of G. S. 1949, 62-301, is not a criminal prosecution in the constitutional, or statutory, sense but an investigative proceeding designed only to obtain evidence of crimes committed against the laws of this state with a view of punishing the offenders.

4. *WITNESSES — Constitutional Privilege.* The constitutional privilege that a person shall not be required to be a witness against himself is of great value to a citizen when accused of crime and it should be carefully guarded for his protection.

5. *SAME—Immunity from Prosecution—Power of Legislature.* Legislatures possess the power to grant immunity from criminal prosecution under state laws to witnesses who are required to testify concerning violations thereof. Such power is recognized as a public necessity in the enforcement of laws for the protection of society as a whole.

6. *INQUISITION — Granting Immunity—Necessity for Witness to Testify.* When immunity from criminal prosecution has been guaranteed to a citizen relative to evidence he might give in a legally constituted inquisitorial proceeding he may no longer insist on remaining silent on the ground his testimony might incriminate or tend to incriminate, him, the reason being the immunity leaves him in the same position as though there were no laws which make his acts a crime.

7. *WITNESSES—Granting Immunity from Prosecution for Violation of State Law—Lack of Federal Immunity No Excuse to Testify.* Upon being granted immunity from prosecution for the violation of state laws a witness in a legally constituted inquisition ordinarily may not refuse to testify on the ground amnesty from prosecution for violation of federal laws has not been guaranteed and this is the universal rule

where inquiry is being made only of violations of state laws.

8. *CONSTITUTIONAL LAW — Effect of Federal Amendments on State Powers.* The first ten amendments to the federal constitution operate on the national government only. They were not intended to, and do not, limit the powers of the states in respect to their own people.

9. *INQUISITION — Refusal to Testify — Punishment.* When punishment has not been imposed on witnesses under the penal provisions of an inquisition statute for refusal to testify but only under the provisions thereof expressly authorizing punishment for contempt of court, the validity of the penal provisions is not involved in a habeas corpus proceeding instituted by such witnesses seeking release from custody.

10. *COUNTIES—Power of County Commissioners—Employment of Additional Counsel.* A board of county commissioners is empowered to employ legal counsel to assist the county attorney in the performance of his duties, in civil or criminal cases, when in its judgment it becomes necessary or expedient to do so.

11. *HABEAS CORPUS—Refusal to Testify in Inquisitional Proceedings—Contempt—No Constitutional or Statutory Rights Violated.* The official records in three original habeas corpus proceedings examined, considered and held, they disclose no conduct which contravenes the rights of petitioners under the fifth, sixth or fourteenth amendments to the federal constitution or of section ten of our state bill of rights; and further held, the sentences pronounced and the commitments issued for direct contempt do not violate any statutes of this state.

Original proceedings in habeas corpus. Opinion filed March 3, 1954. Writs denied. 45-175 Kan.

Payne H. Ratner, of Wichita, argued the cause, and *Louise Mattox, Payne H. Ratner, Jr., Russell Cranmer,*

Dale B. Stinson, Jr., Starr Calvert, Jr., Carroll Pope, and *Keith Eales,* all of Wichita, were with him on the briefs for the petitioners.

Warner Moore, county attorney, and *Paul R. Kitch,* of Wichita, argued the cause, and *Manford Holly, Charles D. Anderson, Dale M. Stucky,* and *Donald R. Newkirk,* all of Wichita, were with them on the briefs for the respondent.

Harold R. Fatzer, attorney general, *Paul E. Wilson,* assistant attorney general, and *Roy Kirby,* of Coffeyville, were on the briefs amicus curiae.

The opinion of the court was delivered by

Wedell, J.: Three original habeas corpus proceedings have been consolidated upon request of the parties. The petitioners are Cecil L. Courtney in case No. 39,455, Philip T. Ferris in case No. 39,454, and Ray Parks in case No. 39,459.

An inquisition was conducted in the district court of Sedgwick county upon request of the Sedgwick county attorney to make inquiry into certain offenses against the laws of the state of Kansas. His request for the inquisition was based on alleged damage to and destruction of real and personal property by use of paint bombs, fire bombs and fluid bombs and assaults and battery in connection with a taxicab strike in Wichita, by persons whose names were unknown to him. The purpose of the requested inquisition was the prevention of similar further occurrences and to determine the names of the guilty parties in order that they might be punished for violation of the laws of Kansas.

In the inquisition petitioners were guaranteed immunity from prosecution for the violation of any state laws concerning which they might testify. They were informed the guarantee of immunity did not include immunity from prosecution for perjury if committed by them in the course of the inquiry.

Petitioners were sentenced to serve terms of imprisonment in the county jail for direct contempt of court by reason of their refusal to answer certain questions propounded to them during the investigative proceedings.

It is conceded that for all practical purposes the petitions for the writ are identical, except as to parties, insofar as alleged grounds for release from custody are concerned. The alleged illegality of their sentences and commitments, recited in the petitions, will be considered under their respective contentions.

We pause to state petitioners' motions to strike certain paragraphs of respondent's answers have been examined. If the matters petitioners seek to have stricken from the answers "do not add or detract from the issues," as their motions state, such allegations can hardly be characterized as prejudicial. In that respect the exhibits attached to defendant's answer are quite similar to those attached to petitioners' replies. In any event we agree with counsel for petitioners that some of the matters sought to be stricken are not entirely germane to the legal issues before us. They do, however, disclose some of the background which prompted the request for the inquisition and to that extent they are pertinent.

This court is in nowise presently concerned with the cause or causes of the strike or with attaching blame therefor. Nor is it our present function to intimate even remotely who may or may not be guilty of violating any criminal laws of this state. Those subjects are all entirely foreign to any issue now before us. The sole question to which we now are required to address our attention is whether petitioners, irrespective of the group or organization to which they may belong, if any, have been deprived of their liberty in contravention of their constitutional privileges and guarantees or other legal rights. The first question is does G. S. 1949, 62-301 authorize this investigative proceeding? It reads:

'If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other

person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; *or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state.* Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county, and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and returned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. *Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or*

any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. *A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment.* If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. *No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state.'* (Our italics.)

Counsel for petitioners, with commendable frankness, concede that at the time of the inquiry they believed the inquisition was "entirely legal" but that it was conducted in an illegal manner in certain particulars, which

will be stated later. They now state the inquisition was wholly illegal and that the above statute does not authorize it. These are original proceedings in this court. Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decision on technicalities. We shall fully consider petitioners' contentions as now made. This requires first a careful analysis of the above statute.

Petitioners contend the first part of the statute, prior to the first italicized portion thereof, limits the scope and purview of inquiry to acts connected with the three specific classes of offenses therein designated. We believe such a construction of the statute does violence to its declared intent and purpose. The portion of the statute on which petitioners rely does pertain to an investigation concerning the three subjects specified, by and before the law enforcement officers therein designated. That, however, is only one portion of the statute. Beginning with the first italicized portion the legislature clearly broadened the extent of inquisitorial powers to include *judicial proceedings* before the district judge, a judge of the city court or justice of the peace. As to judicial proceedings it clearly broadened the scope of an inquisition to include "any offense against the laws of the state." It further empowered such judicial officers to issue subpoenas to witnesses to appear and testify before them. The instant proceedings were all conducted pursuant to the latter part of the statute which pertains to judicial inquisitorial proceedings. Those proceedings included a written statement made by the county attorney to the district court, the issuance of subpoenas by the district court and the hearings before such court.

Under the first part of the statute a refusal to answer proper questions before the officers designated, of course, is not declared to constitute contempt. The right to punish for contempt is expressly limited to a judge or justice of the peace. Moreover, it is well established that district courts of this state, independent of statute,

have inherent power to punish for contempt and to make such reasonable orders as are necessary to protect and preserve their judgments. (*State v. Coleman*, 168 Kan. 159, 211 P. 2d 81.) Careful analysis of the entire statute, which is always required to determine legislative intent, clearly indicates an intent to provide two separate and distinct inquisitorial or investigative proceedings which may be employed. The first pertains only to a violation of specific laws mentioned in the first part of the statute and by the officers there named. The other applies to a violation of any state law and a judicial inquiry. We, therefore, are obliged to conclude counsel for petitioners were correct in their first impression that the inquisition itself was "entirely legal."

We shall next consider petitioners' contention the inquisition, as conducted, violated their constitutional guarantees and other legal rights. If that be true petitioners should be promptly released from custody. That is the beneficent purpose of the ancient writ of habeas corpus. That such a sacred right should be most carefully guarded for the protection of the citizen against autocratic power is not debatable under a government dedicated to protect the rights of its people. Can a citizen under a government ordained to protect not only him, but all citizens, from crimes against persons or property refuse to testify when his government calls on him to assist in investigating crimes for the protection of society as a whole? That question, under constitutional guarantees, cannot be answered in the affirmative without definite qualifications.

Petitioners assert the inquisition, as conducted, violated the fifth, sixth and fourteenth amendments to the federal constitution and section ten of the Kansas bill of rights.

The pertinent portion of the fifth amendment reads:

'No person shall be . . . compelled *in any criminal case* to be a witness against himself, nor be deprived of

life, liberty, or property, *without due process of law* . . . " (Our italics.)

The sixth amendment, insofar as material, provides:

'In all *criminal prosecutions,* the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.' (Our italics.)

The essential part of the fourteenth amendment states:

' . . . No State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property *without due process of law.* . . . ' (Our italics.)

The material portion of section ten of our bill of rights recites:

'*In all prosecutions,* the accused shall be allowed to appear and defend in person, or by counsel . . . *No person shall be a witness against himself.* . . . ' (Our italics.)

The constitutional privilege that a person shall not be required to be a witness against himself is of great value to a citizen accused of crime. But it is well settled that legislative bodies possess the power to authorize investigative proceedings to uncover crimes. Grand juries performed that function for many years before statutes providing for inquisitions such as the one under consideration were enacted. The functions of a grand jury are proceedings in the nature of judicial inquiry and are not criminal prosecutions. (*Hale v. Henkel,* 201 U. S. 43, 63-65, 50 L. ed. 652, 26 S. Ct. 370) Legislatures possess the power to grant amnesty to witnesses and to compel them to give testimony against themselves. Such power long has been recognized as a public necessity in the enforcement of laws. (*State v. Jack,* 69 Kan. 387, 396, 76 Pac. 911; *Jack v. Kansas,* 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73.)

When immunity from prosecution has been granted on testimony adduced by a witness he no longer has a right to remain silent on the ground that his testimony might incriminate him. The reason is obvious. Personally he then is in the same position as though there were no statute which makes the acts concerning which he testifies a crime.

It must be remembered constitutional guarantees relied on by petitioners, except the fourteenth amendment to the federal constitution, apply only to criminal prosecutions. That is likewise true of section ten of the Kansas bill of rights. This inquisition is not a criminal prosecution. In it petitioners were not charged with any crime. The inquisition is only an investigative process to uncover crimes against the state of Kansas and to ascertain who committed them.

Furthermore, it is unnecessary to cite numerous authorities in support of the long established principle that the first ten amendments to the federal constitution operate on the national government only and were not intended to, and do not, limit the powers of the states in respect to their own people. (*Jack v. Kansas*, supra.)

In our own case of *State v. Jack*, supra, this court had under consideration an inquisition statute similar in all material respects to the instant one.

That statute pertained to investigations under our "anti-trust law" in which all the federal and state constitutional guarantees now relied on by petitioners were asserted except the sixth amendment to the federal constitution. The court held the statute was not unconstitutional, that it was a valid exercise of judicial power and the proceeding constituted "due process of law." (p. 394.) It further held that the recalcitrant witness was properly committed to imprisonment for contempt by reason of his refusal to answer questions propounded. It was held:

> "The immunity afforded by section 10 of the anti-trust law of 1897 to a witness subpoenaed in a proceeding or inquiry to testify to his knowledge of violations of that law is coextensive with the constitutional privilege that 'no person shall be a witness against himself'." (Syl. par. 3.)

The Supreme Court of the United States affirmed the decision. (*Jack v. Kansas,* supra.)

Petitioners contend they were deprived of counsel in contravention of the sixth amendment to the federal constitution. From an examination of the record it well may be debatable whether any of them actually demanded or requested counsel. They did, however, object to testifying on the ground they were without counsel. We have indicated previously (1) the sixth amendment to the federal constitution does not apply to state statutes and (2) this inquisition was a preliminary investigative proceeding to uncover crime and was not a criminal prosecution.

It is well settled an investigation of crime by a grand jury is not a criminal prosecution within the guarantee of the sixth amendment and a witness testifying before it is not entitled to advice of counsel. (*United States v. Blanton,* 77 F. Supp. 812; *Gilmore v. United States,* 129 F. 2d 199, [certiorari denied, 317 U. S. 631, 87 L. ed. 509, 63 S. Ct. 55]; *In re Black,* 47 F. 2d 542.) This court likewise has held a preliminary hearing in a felony case does not fall within the definition of a criminal prosecution and that, absent a statutory requirement, a defendant's rights are not invaded without the appointment of counsel for such a hearing. (*Fry v. Hudspeth,* 165 Kan. 674, 676, 197 P. 2d 945; *Dionne v. Hudspeth,* 166 Kan. 72, 73, 199 P. 2d 176.)

Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended the inquisition should be held in secret. We shall not burden the opinion with a lengthy discussion of the subject. There is nothing in the present statute which in anywise

indicates a public hearing is contemplated. Proceedings before grand juries and similar investigative bodies seldom, if ever, have been conducted publicly. The reasons are clear. Some of the reasons for conducting such an inestigation without publicity are the importance of preventing scheming and conspiring to nullify the effectiveness of inquisitorial functions and to avoid the escape of those who later mght be prosecuted by reason of facts disclosed. Another reason is the cloak of secrecy protects witnesses, willing to assist in bringing to justice those who may be endangering the safety of society from unnecessary censure, criticism and abuse. (*State v. Branch*, 68 N. C. 186.) Constitutional provisions which require *that an accused* be permitted to meet witnesses face to face apply only to criminal prosecutions and not to mere investigative proceedings. Petitioners had not been accused of committing any crime.

Petitioners urge the statute provides no immunity from prosecution for violation of federal laws as distinct from state laws and the immunity guaranteed in the instant inquisition was, therefore, inadequate. The testimony elicited in this proceeding, which petitioners refused to answer, relates only to a violation of state laws. Under these circumstances petitioners are not in a position to complain immunity from prosecution under federal laws was not guaranteed. Moreover, the validity of petitioners' contention has been denied in connection with an inquisition conducted under our state "anti-trust law" even though a federal statute governing the same subject matter existed as applied to interstate commerce. In *State v. Jack*, supra, this court held:

> "A witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of the anti-trust law cannot refuse to give his evidence on the ground that the immunity provided by section 10 of the act does not afford protection against the use of his evidence in a prosecution against him for violations of the federal anti-trust law." (Syl. Par. 4.)

On appeal to the Supreme Court of the United States that court in *Jack v. Kansas,* supra, held:

> "The provisions in the Kansas anti-trust law, as construed by the highest court of that State, compelling witnesses to testify as to violations of the act, and granting immunity from prosecution for violations testified to, or the use of the testimony against the witness, are not void under the Fourteenth Amendment, because immunity from Federal prosecution is not granted; and one committed, in accord with the provisions of the statute, for contempt for refusing to testify to acts within his knowledge is not deprived of his liberty without due process of law." (p. 372.)

See, also, *Hale v. Henkel,* supra, p. 68, in which *State v. Jack,* supra, and *Jack v. Kansas,* supra, are cited and again approved.

Petitioners complain of the presence and participation of special attorneys in the inquisition. They were all appointed pursuant to a resolution of the board of county commissioners at the nominal salary of $1.00 each to assist the county attorney in conducting the proceedings. The law authorizes the action of the board. (G. S. 1949, 19-723, 28-319; *Womer v. Aldridge,* 155 Kan. 446, 125 P. 2d 392.) Such attorneys were all duly sworn to discharge their duties as deputy county attorneys. As deputies they were only assisting the county attorney and had a right to act in that capacity. (*State v. McCombs,* 163 Kan. 225, 228, 181 P. 2d 473.)

The official transcripts of the original proceedings in each case have been carefully examined. We find no attempt to have them amended in any particular. They reflect no conduct which would justify nullifying the proceedings.

Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitu-

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tional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel.

Before proceeding to discuss the subject of contempt it clearly should be stated the penal provision of the statute making refusal to testify a misdemeanor punishable by fine or imprisonment, or both, was not invoked in these cases and we are not now concerned therewith. The court exercised only the statutory authority conferred upon it relative to direct contempt. And, as previously indicated, it had that inherent power independent of statute.

Petitioners' contention fails to recognize the distinction between direct and indirect contempt. It ignores the statute which provides persons shall be proceeded against for direct and indirect contempt only as prescribed by statute. (G. S. 1949, 20-1201.)

G. S. 1949, 20-1202, distinguishes between direct and indirect contempt as follows:

> "That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts."

In proceedings for indirect contempt the law requires a written accusation, answer of the accused, a trial and a judgment based on testimony. That law also provides if the accused files an answer the trial proceeds on testimony as in criminal cases and the accused is entitled to be confronted with the witnesses against him. (G. S. 1949, 20-1204.)

In proceedings for direct contempt the law is entirely different. G. S. 1949, 20-1203, provides:

> "That a direct contempt *may be punished summarily, without written accusation against the per-*

son arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon." (Our italics.)

G. S. 1949, 20-302, reads:

"The judges of the district courts, within their respective districts, shall have and exercise such power in vacation or at chambers as may be proided by law, and shall also have power . . . to punish for contempt in open court or at chambers, by fine, not to exceed one hundred dollars, and imprisonment or either, and to assign not exceeding one attorney to prisoners who may be unable to employ counsel."

The last preceding section does not limit contempt powers except in chambers. (*In re Millington, Petitioner, etc.,* 24 Kan. 214.)

Here we are concerned only with direct contempt of court committed in the presence of the presiding judge, who had personal knowledge of exactly what transpired. In *Savin, Petitioner,* 131 U. S. 267, 33 L. ed. 150, 9 S. Ct. 699, the court, speaking by Mr. Justice Harlan, said:

"We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry,* 128 U. S. 289, 309; whereas,

in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony unded oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." (p. 277.)

And in *Cooke v. United States,* 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390, Mr. Chief Justice Taft, speaking for the court, stated:

"To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. *There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense.* Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." (Our italics.) (p. 534.)

Petitioners further argue there was no compliance with G. S. 1949, 20-1203 for the reason they were committed before judgment was entered of record. The journal entries in all three cases bear the exact dates on which petitioners were sentenced and committed. There is no evidence the journal entries were not prepared and signed by the district court judge on those dates. It is true that in two of the cases the journal entries were not actually filed until four days later and in one of them five days later, The official transcript of the record in each case, however, discloses sentence was pronounced and the petitioner was committed on the date indicated in the journal entries and at the time the witness refused to testify. A journal entry is evidence of the judgment rendered. Our view is the judgments of the court were properly preserved in the official records and there was substantial compliance with the statute in cases of direct contempt. The official rec-

ords preserved every act sufficiently to enable this court to examine the validity of every contention now advanced by petitioners or which might have been presented on a direct appeal from the judgment rendered under the provisions of G. S. 1949, 20-1205. The journal entries also complied with the requirements of G. S. 1949, 20-1203 in all other respects. On the subject of an insufficient record petitioners rely heavily on *Wallace v. Weber,* 134 Kan. 201, 5 P. 2d 855. A reading of the opinion will readily disclose no record of any kind was there made in the police court, where the alleged contempt occurred, until long after sentence was pronounced and the commitment was issued. In that case this court affirmed the decision of the district court releasing petitioner from custody on the ground of utter failure to comply with the provisions of the statute concerning the preserving of a record. In fact, the record of the police judge was so incomplete and imperfect it was difficult to ascertain what occurred at the contempt hearing. Furthermore the commitment itself did not state the facts upon which the contempt judgment was founded.

The syllabus in the Wallace case does not support petitioners' contention. If any portion of the opinion in that case is properly subject to the interpretation that in case of direct contempt a district judge is compelled to halt all judicial proceedings and prepare and file a formal accusation of contempt or file a journal entry of judgment before he pronounces sentence and issues a commitment, it is overruled.

We think it proper to say these cases were advanced for special hearing in order to comply with the urgent request of the parties for an early decision. In view of that request we have not extended the opinion with citation of additional authorities or with a review of numerous cases supplied by the industry of respective counsel. Their careful examination, however, has not altered or modified the views herein expressed. A few other interesting but not determinative matters referred to by coun-

sel for the respective parties need not be treated in view of conclusions previously expressed.

The petitions for writs must be denied. It is so ordered.

Smith, J. (dissenting): I find myself unable to agree with the opinion of the majority as to the statement of law contained in paragraph 2 of the syllabus and the corresponding part of the opinion.

My view is, only the first part of G. S. 1949, 62-301, confers authority and jurisdiction on any official or court to hold an inquisition. That applies to the laws of the state relating to gambling, intoxicating liquor or any violation of any law where the accused is a fugitive from justice. There is no pretense the case here falls into any one of those three categories. The remainder of the section refers only to procedural matters.

My basis for this conclusion is partly historical. The first of the inquisition statutes was enacted and passed in 1885. It was part of a chapter that amended the prohibitory law in force at that time then in an experimental stage. Since that time we have had many attorneys general assistant attorneys general and thousands of county attorneys. Not one of them up to now ever used that statute in conducting an inquisition such as this except under the three categories named.

What took place in this case is as potent an argument as could be made why the legislature never intended to give such sweeping powers to any court.

Here in the case of Courtney the petitioner was punished, not for refusal to answer any particular question, but for refusal to answer a question the way the special assistant attorney desired it to be answered. This official was exploring the question of to whom Courtney gave some fluid when he brought it to strike headquarters in his car. It is clear from the transcript that Courtney meant to say he did not give it to anybody, but whoever took it knew it was in his car and came and got it from

his car. The officials present, and there were none but officials present, were determined that he should say to whom he gave this and when he was unable to do so decided to punish him for contempt. Had they believed he was testifying falsely the remedy of the state was to try him for perjury, not to punish him for contempt. Such conduct is what the legislature endeavored to guard against by refusing to give such drastic power to courts and law enforcement officials.

The argument, the grand jury performed the function of investigation of crimes before statutes providing for inquisitions were enacted, leaving the implication there is more necessity for an inquisition statute relating to crimes generally than there was before, is not sound. I would be persuaded by it were it not for the fact the grand jury statute has continued on our books ever since first enacted in the early days of statehood. It is still extensively used where deemed necessary in ascertaining whether or not crimes have been committed. There is a great deal of difference in the consideration given the individual citizen when he is called to testify before a grand jury than when he is called before a judge of the district court holding a purported inquisition such as the majority opinion holds this statute provided for.

The grand jury is comprised of citizens of the community to which the witness belongs. There are twelve or more of his peers there on the grand jury when he is called upon to testify. The statute provides they shall be picked by lot. That is a far different affair from an inquisition such as described here, where the witness is called in before a battery of county attorneys, special county attorneys and police officers before a court selected by those officials when the inquisition was begun. This, in my opinion, is the reason the legislature never did intend that G. S. 1949, 62-301, should be given the construction the majority opinion gives it.

A persuasive incident to me is that when these men were sentenced, in one case to three months, and in the other cases to a year in the county jail, the sentences were not in the alternative that they should purge themselves of contempt, but were direct sentences to that much of a term in the county jail.

The entire affair was punitive and not in the interest of obtaining evidence. Had the investigation been carried on in good faith the sentences would have been, petitioners should be confined in the county jail for the terms indicated or until they should purge themselves of contempt.

Counsel in the oral argument stated such would be the construction given, that is, they would be offered an opportunity to purge themselves, but nowhere in this record do we find any such a provision in the so-called sentences.

It should never be overlooked, the qualification and the only qualification for an inquisitorial statute is, to obtain information. It is not punitive. The state in these proceedings argues in one breath the purpose is as above, hence the constitutional safeguards do not apply, and in the next breath conducts the inquisition so that the net result is punitive.

Should these petitioners see fit to stay in jail for the terms for which they were sentenced, and there is no indication they may be afforded an opportunity to do otherwise, then the end the state advances in the inquisition will be defeated.

Actually the state is by this proceeding avoiding the necessity for calling a grand jury. That is a time-honored institution for which our statutes still provide. It is calculated to safeguard the rights of witnesses as well as to aid in intelligent law enforcement.

Granting for the sake of argument that the inquisition had a legal basis, still I am convinced the record in this

case requires the granting of these writs. G. S. 1949, 62-301, provides, among other things, a witness may be imprisoned for contempt for any refusal to answer questions. This must be construed to mean any proper question or any question asked for the purpose of securing information bearing on the commission of any crime. That must be the proper construction since such is the only reason to justify an inquisition such as this. Obviously before a witness could be punished for contempt for refusing to answer a question, it must appear he was in possession of some such information. The matter of the testimony of Courtney, who was sentenced to three months in jail, has been dealt with already in this dissenting opinion. In the cases of Ferris and Park, each of whom was sentenced to a term in jail of a year, the transcript of the proceeding attached to the sheriff's return shows the only question asked either one of them bearing on his possession of information was whether he was a striking taxicab driver. There was no testimony whatever that either one of them knew any facts useful to the state. No questions were asked bearing upon the commission of any acts of violence.

These petitioners have been deprived of their liberty for a year. In my opinion where such a judgment is entered, be it the result of a conviction before a jury, or after a contempt proceedings, the basis therefor should be clear and free from doubt.

It is my opinion, the orders sentencing these petitioners were arbitrary and unreasonable and in making them the court abused its discretion. The fact that these sentences did not offer the petitioners the privilege of purging themselves of contempt by testifying adds weight to the above conclusion.

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No. 179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

CECIL L. COURTNEY, PHILLIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas.

REPLY BRIEF OF PETITIONERS.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
Attorneys for Petitioners.

KANSAS LAW PUB. CO., TOPEKA

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STATEMENT.

Petitioners deem it necessary to file a brief in reply to the brief of Respondent in opposition to the petition for writ of certiorari, for the purpose of correcting certain erroneous statements contained in the brief of the respondent.

ARGUMENT.

Respondent states in his brief in opposition, at p. 3:

> "Petitioners now contend that the secrecy of the inquisition proceeding, including their commitments for contempt violated their rights under the Federal Constitution (Petition, p. 4). They rely on the case of *Re William Oliver*, 333 U. S. 257, to support their contention (Petition, p. 4). But before the Supreme Court of Kansas, petitioners' sole objection to the secrecy of the entire proceeding was based upon petitioners' construction of the inquisition statute (R. 2, 4-5, 7-8). The Oliver case was never cited by petitioners in the four briefs which they filed below, including their brief in support of a motion for rehearing; *and the Oliver Case was never considered by the Court below* (R. 172-193). *The secrecy question, as a constitutional problem, made its first appearance in this proceeding when the petition for writ of certiorari was filed by petitioners.*" (Emphasis supplied.)

In reply to this contention of respondent, this Court's attention is directed to the opinion of the court below (R. 185), wherein it is said:

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate *constitutional* and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel." (Emphasis supplied.)

In petitioners' first brief filed in the original proceedings in the Supreme Court of Kansas it was said, at p. 28:

"It may be argued that petitioners were subpoenaed as witnesses and did not appear as accused. However, this contention may be easily met by an examination of the statute (G. S. 1949, 62-301) under which the petitioners were adjudged in contempt, which recites in part: 'A judge . . . may fine, or imprison any person for contempt on account of his refusal . . . to answer questions as a witness . . .'

"The above quoted portion of the statute clearly places any person subpoenaed to testify as a witness in an inquisition proceeding in the position of an accused, *upon his refusal to testify.* The proceedings which resulted in the confinement of the petitioners were not only conducted in secret but petitioners were denied counsel *after* they had refused to testify and *before* sentence was passed. They were not permitted to ascertain their rights and privileges from counsel of their own choice when they stood before the Court accused of contempt, behind locked doors and in the presence of officers of the court whose interests, in the minds of the petitioners, were inimically opposed to theirs.

"Nothing can be found in G. S. 1949, 62-301, which limits, or is in derogation of the petitioners' constitutional guaranties of a public trial. Proceedings *in camera,* except in special instances provided by statute, are repugnant to the fundamental principles of English and American law. . . . " (Italics appeared in the original printed brief.)

The above, of course, does not appear in the record before this Court. However, petitioners are confident that respondent will not deny (in the face of concrete proof afforded by the original printed brief and his acknowledgment of receipt thereof) the accuracy of the quoted material.

It is quite true that petitioners did not cite *Re William Oliver,* supra, in support of the argument quoted from their brief before the Court below, for the reason that the case had not been discovered in petitioners' research. It must be admitted, nevertheless, that petitioners' argument was certainly in point with this Court's opinion in that case.

Respondent states in his brief " . . . the *Oliver* case was never considered by the Court below" (p. 3). It may well be that the Supreme Court of Kansas did not consider the cited case. However, the statement by respondent is tantamount to an accusation that the Supreme Court of Kansas was derelict in its duty, as the brief of the Attorney General of Kansas, as Amicus Curiae, makes abundant reference to the *Oliver* case. Nearly three full pages (pp. 58, 59, and 60) of the Attorney General's brief is devoted to a comprehensive, although erroneous, discussion of the Oliver case and its significance and relation to the instant case. The discussion begins at p. 58, and states

> "No discussion of this problem could be complete without some reference to *In re Oliver,* 333 U. S. 257, decided by the Supreme Court of the United States in 1948. Reference to the facts involved indicate the basis for the Court's decision."

Again, the briefs filed in the Court below do not constitute a part of the record before this Court; but petitioners are forced to go beyond that record by the misleading and erroneous statements of respondent in his brief in opposition to the petition. Petitioners cannot

assert with certainty that counsel for respondent who prepared the brief in opposition were ever served with the brief amicus curiae. However, it should be noted that the Attorney General of Kansas now appears as counsel for respondent, and it was under his direction, presumably, that the brief citing the *Oliver* case was prepared. The attention of the Supreme Court of Kansas was also directed to the *Oliver* case in oral argument by Mr. Paul Kitch, of counsel for the respondent, who attempted to distinguish it from the instant case. Mr. Kitch's name appears on page 9 of the Brief for Respondent in Opposition.

Respondent makes much of the fact that the Supreme Court of Kansas failed to refer to the *Oliver* case in either its majority or dissenting opinions. The only significance that can be attached to that fact is that it is impossible to reconcile the *Oliver* decision with the majority opinion of the Supreme Court of Kansas in the instant case. Petitioners certainly cannot be held responsible for the failure of the Court below to cite a case which is controlling, and directly antithetical to that Court's opinion; nor can petitioners be charged with the omission from the majority opinion of the Supreme Court of Kansas of any reference to petitioners' arguments which would tend to vitiate its decision.

CONCLUSION.

It is submitted that the federal questions sought to be reviewed herein were properly raised and fully presented in the Supreme Court of Kansas, by the pleadings, briefs, and upon oral argument.

It is further respectfully requested that a writ of certiorari issue to the Supreme Court of Kansas, to the end that the decision of said court may be reviewed by this Court and the errors contained in said decision be corrected.

Dated September 30, 1954.

PAYNE H. RATNER,
Attorney for Petitioners,
444 North Market,
Wichita, Kansas.

Service on counsel for respondent of a copy of above reply brief is hereby acknowledged this ..... day of ....., 1954.

..... Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 179.

CECIL L. COURTNEY, PHILIP T. FERRIS, AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Kansas.

BRIEF OF PETITIONERS.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
Attorney for Petitioners.

LOUISE MATTOX,
PAYNE H. RATNER, JR.,
RUSSELL CRANMER,
DALE B. STINSON, JR.,
CARROLL F. POPE,
KEITH EALES,
CLIFF W. RATNER,
WILLIAM L. FRY,
A. W. MURPHY,
444 North Market,
Wichita, Kansas,
of Counsel.

KANSAS LAW PUB. CO., TOPEKA

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IN THE

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CECIL L. COURTNEY, PHILIP T. FERRIS,
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PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Kansas.

BRIEF OF PETITIONERS.

I. OPINION OF COURT BELOW.

The opinion of the Supreme Court of Kansas (R. 173) is reported in volume 175 at page 704 of the Kansas Reports, and appears at pp. 173 to 192 of the printed transcript of the record herein.

II. JURISDICTION.

1. The decree to be reviewed herein was rendered on March 3, 1954; rehearing denied, April 14, 1954 (R. 196). Petition for certiorari and brief in support thereof, certified record, and order for entry of appearance of coun-

sel were filed in this court on May 29, 1954, and docketed on June 30, 1954.

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 1257 of Title 28 of the United States Code (62 Stat. 929).

3. The decree of the Supreme Court of Kansas is a final judgment and that court is the highest court in the state in which a decision in these cases could be rendered. Petitioner's motions for rehearing were denied. Rights, privileges and immunities guaranteed to petitioners by the Constitution of the United States were specially set up and claimed in petitioner's original applications for writs of habeas corpus in the state court, and in their briefs and oral arguments before it.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved are:

(a) Section One of the Fourteenth Amendment to the Constitution of the United States.

(b) Section Ten of the Bill of Rights of the Constitution of the State of Kansas.

Statutes involved are:

(a) General Statutes of 1949 of the State of Kansas Section 62-301; Section 20-1201; Section 20-1202; Section 20-1203; Section 20-302.

The texts of the foregoing are set forth in the appendix hereto.

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IV. QUESTIONS PRESENTED FOR REVIEW.

(a) May witnesses subpoenaed to testify at a secret inquisition proceeding be accused of direct contempt of court and be tried, sentenced and committed to jail without interruption of the secrecy?

(b) Does the failure to afford witnesses an opportunity to confer with counsel of their choice, or to defend or purge themselves of an alleged contempt, when they stand accused of direct contempt, at a secret inquisition proceeding, constitute a denial of procedural due process of law?

V. STATEMENT OF THE CASE.

These were original applications for writs of habeas corpus brought in the Supreme Court of the State of Kansas and consolidated for hearing. The petitioners alleged they were unlawfully imprisoned by the respondent sheriff pursuant to judgments and sentences of a judge of the District Court of Sedgwick County, Kansas, who was presiding at an inquisition proceeding allegedly authorized by the laws of that state. (R. 1-9) The applications were denied (R. 173-189), and petitioners moved for rehearing and permission to file briefs in support of their motion (R. 192). Permission to file briefs was granted and petitioners were allowed bail (R. 193-196). After consideration of petitioners' briefs and arguments, their motion for rehearing was denied (R. 196).

The principal questions presented by petitioners' applications and determined adversely to them were:

1. Whether the judge of the District Court had jurisdiction to render the judgments and impose the sentences in a secret proceeding without affording the petitioners an opportunity to confer with counsel prior to the judgments and sentences.
2. Whether the privileges and immunities extended to the petitioners by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were abridged by the judgments, sentences and imprisonment.
3. Whether the inquisition proceeding at which petitioners were adjudged guilty of contempt was valid under the Constitution and laws of the State of Kansas.

Petitioners were taxicab drivers and members of a local of the teamster's union which had been called out on strike. The employers at whom the strike was directed were four taxicab companies, owned by two individuals, Rex Bulleigh and Jack Graham (R. 150,) and constituted a monopoly of the taxi service in the City of Wichita. Violence occurred during the progress of the strike. The first serious act of which complaint was made was committed by one of the owners of the cab companies (Pet. Ex. IX, R. 159-160). Altogether thirty-six separate acts were made subjects of formal complaint to the city and county police authorities between December 1, 1953, and January 9, 1954, which involved striking and non-striking cab drivers and the owners of

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the cab companies (Res. Ex. "A" & "B", R. 17-23).

On January 7, 1954, the county attorney of Sedgwick County filed a statement and request for inquisition (Res. Ex. "E", R. 28) pursuant to G. S. 1949, 62-301.[1] The proceeding was transferred from the division of the court in which it was originally filed to Division 2 of the court on January 8, 1954, (Res. Ex. "F", R. 29). On January 11, 1954, special deputy county attorneys were appointed to conduct the inquisition (Res. Ex. "G", "H", "I", and "J"; R. 30-34) Forthwith subpoenas were issued for two of the petitioners on January 18, 1954, (R. 14 and 43); a forthwith subpoena was served on the other petitioner on January 19, but he was not interrogated until the 20th (R. 85). The petitioner Ferris was arrested on a bench warrant and held incommunicado in the county jail for six hours prior to his interrogation (Pet. Ex III, R. 152). The petitioners were brought before the inquisition tribunal separately and were told they were not entitled to counsel. The proceeding was secret and the atmosphere was hostile. The petitioners averred they were subjected to intimidation (Pet. Ex. III, R. 152; Ex. IV, R. 153; Ex. V, R. 155). Other witnesses subpoenaed to testify before the inquisition proceeding corroborated substantially the affidavits of the petitioners as to the manner in which the inquisition was conducted.

One witness, Elva Smith, the wife of the business agent of the local, was arrested and taken before the inquisition at about 6:00 p. m., on January 11. She was

1. Appendix C, p. 48.

interrogated as to the whereabouts of her husband and when she answered she did not know, she was held in contempt and placed in the county jail. She was subsequently released after midnight on condition she return and testify the next morning; this she did (Pet. Ex. II, R. 151-152).

Another witness, James J Hyatt, was subpoenaed on January 14; he accompanied the officer serving the process and remained at the court house for eight hours, and was then advised that the inquisition had been adjourned; he returned on seven separate days and waited periods of two to eight hours before being dismissed. This witness was actually before the inquisition three times; he was informed that not only was he not entitled to counsel, but that he was not to consult with counsel after his testimony was concluded (Pet. Ex. VII, R. 157-158).

Victor E. Haines received similar treatment (Pet. Ex. VI, R. 156-157), as did Sam Smith, the business agent of the local (Pet. Ex. I, R. 148-150).

The petitioners refused to answer certain questions propounded by the special deputy county attorneys and the presiding official, the district judge, during their interrogations. They were immediately accused of direct contempt of court, adjudged guilty and sentenced to jail. Ferris and Parks were sentenced to terms of one year; Courtney was sentenced to ninety days (R. 102; R. 142-143; R. 135-136). At the time of their respective refusals to answer the questions directed to them, and the accusations, judgments and sentences, the only persons

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permitted in the court room were the judge who presided at the inquisition, members of the county attorney staff, law enforcement officials and, apparently, a court reporter. In the case of Ferris there were present in the courtroom, in addition to the petitioner, three attorneys representing the State of Kansas, the judge, a deputy sheriff, the bailiff and a city detective. There were no representatives of the general public or press present at any stage of the inquisition proceeding. (Pet. Ex. III, R. 152-153). When Courtney was brought before the inquisition there were five attorneys representing the State, the judge, the bailiff, a deputy sheriff, and two city policemen; during the entire proceeding the doors were closed and no members of the public or representatives of the press were permitted entrance (Pet. Ex. IV, R. 153-154). Parks received similar treatment (Pet. Ex. V, R. 155-156).

These facts were presented to the court below on affidavit and were uncontroverted by the respondent. They must be considered here as true. Petitioners submit that the proceeding at which they were accused and convicted of contempt of court, and at which they were sentenced and committed to jail did not meet the standards of due process of law as established and required by the Fourteenth Amendment to the Constitution of the United States,[2] and Section ten of the Bill of Rights of the Constitution of the State of Kansas.[3]

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2. Appendix A, p. 47.
3. Appendix B, p. 47.

ARGUMENT.

Summary of the Argument.

Point A: The basic law of Kansas and the great majority of the other jurisdictions in this country provide for the public trial of an accused in all criminal prosecutions. (Sec. 10, Bill of Rights, Const. of Kansas; 6th Amend., Const. of U. S.). Contempts of court are in the nature of criminal prosecutions. (G. S. Kan. 1949, 62-301; *Gompers v. U. S.*, 233 U. S. 604; *In re Sims*, 54 Kan. 1; 37 Pac. 135.)

As the proceedings in which petitioners were convicted of contempt were criminal prosecutions, petitioners were entitled to the procedural due process of law required by the Federal and State Constitutions. (16 C. J. S. 1171; *Re William Oliver*, 333 U. S. 257; 14th Amend., Const. of U. S.; Sec. 10, Bill of Rights, Const. of Kans.)

A judge designated by statute to conduct a secret inquisition proceeding to investigate alleged offenses against the laws of a state, may not turn such an inquisition proceeding into a trial for criminal contempt and proceed against witnesses without interruption of the secrecy, and during the continuing exclusion of the public. (*Re William Oliver*, 333 U. S. 257.)

An accuseds right to a public trial is of a fundamental character; and it is immaterial whether or not prejudice to an accused results from the

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denial of a public trial. A judgment of conviction must be reversed where an accused is denied a public trial. (*People v. Jelke*, .. App. Div. .., 130 N. Y. S. 2d 662; *People v. Byrne*, 84 CA 2d 72, 190 P. 2d 290; *Re William Oliver*, 333 U. S. 257.)

Point B: The right to assistance of counsel and the right of an accused to be heard in defense in a criminal prosecution is of a fundamental character; and the denial of those rights to such an accused is an abridgment of the "due process of law" clause of the 14th Amendment. (*Cooke v. U. S.*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257; *Powell v. Alabama*, 287 U. S. 48; *Grosjean v. American Press Co.*, 297 U. S. 233; *Brown v. Mississippi*, 297 U. S. 278.)

The record in the instant case discloses that petitioners were accused and convicted of direct contempt of court in a secret inquisition proceeding. A "direct contempt of court" is an act committed in open court which tends to vitiate the court's authority, and may be punished summarily in order to vindicate that authority. A distinction exists, however, in the case of contempt not committed in open court, and in such cases, persons accused and tried for contempt of court are entitled to certain established procedures consonant with the concepts of "due process of law" required by the 14th Amendment. (*Cooke v. U. S.*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257.)

POINT A.

The State of Kansas has, in its basic law, recognized and provided standards of procedure which are generally accepted as essential to the preservation of the rights of individuals and to insure the fundamental fairness of its legal proceedings.

Section Ten of the Bill of Rights of the Constitution of Kansas provides in part:

> "In all prosecutions, the accused shall enjoy the right to appear and defend in person, or by counsel; . . . and a speedy public trial . . . "

The provisions of the Kansas Constitution plainly require that "an accused shall enjoy the right to . . . a . . . public trial" in all prosecutions.

The court below has held that the inquisition was not a "criminal prosecution",[4] and that in it, petitioners were not charged with any crime. Criminal actions or prosecutions are defined by the statutes of Kansas in G. S. 1949, 60-107, which provides as follows:

> "A criminal action is one prosecuted by the state as a party against a person charged with a public offense for the punishment thereof."

It is submitted that the prosecutions for contempts of court are, at least, in the nature of criminal prosecutions.

The statute, G. S. 1949, 62-301,[5] pursuant to which the inquisition was conducted, provides in part:

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4. In re Ferris, 175 Kan. 704, 711; Record, p. 182.
5. Appendix C, p. 48.

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> "A judge or justice of the peace may fine or imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness . . . "

Clearly, the quoted portion of G. S. 1949, 62-301, defines a public offense and provides a penalty therefor. The offense is designated "contempt". The journal entries of judgment in which the convictions and sentences of the petitioners were recorded (Res. Ex. "M"—R. 36, 48 and 89) indicate that the proceedings at which the petitioners were convicted of the offense of contempt were instituted by the State although it does not appear in the caption of the journal entries that the State was a party. It is clear, however, that the State conducted the prosecution for contempt at the secret inquisition proceeding.

In *Gompers v. United States*, (1913), 233 U. S. 604, in an opinion by Justice Holmes, it was said:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the Amendments giving a right to trial by jury, etc., to persons charged with such crimes . . . It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.

> So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that, at least in England, it seems that they still may be and preferably are tried in that way . . . "

That contempt proceedings against a recalcitrant witness are criminal in nature under the laws of Kansas was determined in the case of *In re Sims*, (1894), 54 Kan. 1, 37 Pac. 135, wherein it was said:

> "That a proceeding to punish for contempt is in its nature a criminal proceeding has been directly decided by this court (The State v. Dent, 29 Kan. 416) as well as by courts of other states."

The facts of the cited case disclose that the petitioner refused to answer questions propounded by a county attorney at an inquisition and was thereupon committed to jail for contempt by the county attorney. The Supreme Court of Kansas held that the section of the act conferring power upon county attorneys to commit witnesses for contempt was unconstitutional and void. As a direct result of the decision in the cited case, the antecedent of the current inquisition statute was adopted which provided for inquisitions before judicial officers.

A special concurring opinion, filed by Justice Johnston in the *Sims* Case, supra, contained the following language which accurately defines the nature of the offense and the relationship of the accused and the state:

> "When petitioner refused to answer the question a controversy arose, he was, in effect, accused of an offense. The state was the plaintiff and the prisoner the defendant."

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It is clear that the contempt with which petitioners were charged was direct and criminal. In 12 Am. Jur. 390, Section 4, "direct contempt" is defined. It is there said:

> "A direct contempt consists of words spoken or acts committed in the presence of the court or during its intermission which tend to subvert, embarrass, or prevent justice."

At page 392, Section 6, it is said:

> "Criminal contempt proceedings are those brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders. Civil contempt proceedings are those instituted to preserve the rights of private persons to suits . . . The former are criminal and punitive, in their nature, *and the government, the courts, and the people are interested in their prosecution* . . . " (Emphasis supplied.)

In the case of *Holloway v. Water Co.*, (1917), 100 Kan. 414, 421, 167 Pac. 265, the Supreme Court of Kansas approved the rule above quoted, citing *Bessette v. W. R. Conkey & Co.*, 194 U. S. 324.

Since the proceedings in contempt against the petitioners in the instant case were in the nature of criminal prosecutions it must follow that petitioners were entitled to the procedural due process of law required in criminal prosecutions by the State and Federal Constitutions. The due process of law so contemplated is defined in 16 C. J. S. 1171, Sec. 579, where it is said:

> "Due process in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and

> opportunity to defend, a trial before an impartial judge or judge and jury according to established criminal procedure, and a right to be discharged unless found guilty."

Some of the above elements need not be present in prosecutions for direct contempts of court. It has been said where the contempt is committed in the presence of the court or tribunal, due process does not require an accusation in due form, notice, or an opportunity to defend. It is submitted, however, that "a trial before an impartial judge . . . according to established criminal procedure" are essential elements of the due process of law guaranteed by the Fourteenth Amendment to persons accused of direct contempt, and that the "trial" required must conform to established criminal procedure.

Criminal trials in Kansas, as in every other jurisdiction in this country, are conducted in public. The right to a public trial is specifically guaranteed to an accused by the Constitution of the State.[6] That right is a personal right of the accused. It is not contended that the public trial contemplated by Section Ten of the Bill of Rights of the Constitution of Kansas, or the Sixth Amendment to the Constitution of the United States, confers a right on every member of the public to be present at all criminal prosecutions. It is, however, urged that an accused has an inalienable right to be tried, adjudged and sentenced at a proceeding from which the public is not excluded. The reason for the existence of the right con-

6. Appendix B, p. 47.

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ferred upon an accused by Constitution or statute, is the interest of the community as a whole in the prevention of abuse of judicial authority. A trial from which the public is excluded provides an opportunity, at least, for the exercise of arbitrary and improper power by the presiding official. A public trial, on the other hand, subjects judicial action to public scrutiny, and any encroachment on traditional liberties may thus be exposed, and curtailed by legislation, if need be.[7]

Wigmore lists three reasons, independent of evidential service, for the existence of the right to a public trial. In 6 Wigmore (3rd Ed.) 335, it is said:

> "(a) Subjectively, a wholesome effect is produced, analogous to that secured for witnesses, upon all the officers of the court, in particular, upon the judge, jury, and counsel. In acting under public gaze, they are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedures were public.
>
> "(b) Persons not called as parties to the suits before the courts may nevertheless be affected, or think themselves likely to be affected, by pending litigation. They should have the opportunity of learning whether they are thus affected, and of protecting themselves accordingly; they have the right to be present for the purpose of hearing what is going on.
>
> "(c) The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy . . . "

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7. See 49 Col. Law Review 110, 117.

It was said in the case of *Re William Oliver*, 333 U. S. 257, in the opinion written by Justice Black, at p. 266:

> "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage."
>
> • • •
>
> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty."

The cited case and the instant case are nearly analogous upon their respective facts. In the *Oliver* case, the petitioner was convicted of contempt and sentenced to jail in secrecy at a "one-man grand jury" proceeding authorized by the statutes of Michigan.[8] The petitioner sought a writ of habeas corpus in the Supreme Court of Michigan, and upon denial of his application there, he petitioned this court for certiorari, which was granted. The petitioner contended that the summary manner in which he had been sentenced to jail in the secrecy of the "grand jury" chambers had deprived him of his liberty without due process of law. This court agreed.

The *Oliver* case and the instant case are distinguishable only upon the basis of the differences in terminology of the Michigan Statute (3 Mich. Comp. Laws of 1929, Sec. 17217, et seq.)[9] and the Kansas Statute (G.

8. Appendix D, p. 52.
9. Ibid.

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S. 1949, 62-301),[10] and the fact that in the former the petitioner was accused and convicted of testifying "evasively," while the petitioners in the instant case refused to answer certain questions propounded by their inquisitors. It could be well argued that in the case of the petitioner Courtney, the second distinction does not exist, as it appears from the record that he was punished for his refusal to answer a question *in the manner* the inquisitors desired it to be answered (R. 134-135). In any event, in both the *Oliver* case and the instant case, the petitioners were subpoenaed as witnesses to appear before an investigative body created by statute; in both cases a judicial officer presided, and in both the proceeding was conducted in secret.

Many reasons may be advanced for the secrecy of proceedings conducted for the purpose of the investigation of crimes. However, no reason exists, nor can exist, for secrecy when the investigative body ceases to function for the purpose for which it was designed, and begins to function as a court of law.

It was said in the *Oliver* case, supra, at p. 266:

> "*First*, Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for misconduct called contempt of court

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10. Appendix C, p. 48.

> have not been regarded as an exception to this universal rule against secret trials . . . "

The transition of the nature of the proceeding occasioned by the recalcitrance of the witnesses was ignored by both the Michigan and Kansas Supreme Courts.

In the instant case counsel for respondent and the court below have confused the role played by the judicial officer presiding at the inquisition proceeding. In its opinion the Supreme Court of Kansas implied that the inquisition was equivalent to an investigation by a grand jury. It was said (R. 183):

> " . . . this inquisition was a preliminary investigative proceeding to uncover crime. . .
>
> • • •
>
> "Proceedings before grand juries and similar investigative bodies seldom, if ever, have been conducted publicly."

The statute[11] under which the inquisition proceeding was held, provides, in part:

> " . . . said county attorney . . . may file with the judge of the district court . . . a written statement . . . alleging any offense against the laws of this state, and such judge . . . shall . . . issue a subpoena for the witnesses . . . to be and appear before such judge . . . to testify concerning any offense against the laws of the state."

The quoted portion of the statute requires the "judge" to serve or act in a capacity other than judicial. The judge is not given any discretionary powers by the statute; its terms are mandatory—"such judge . . . shall

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11. Appendix C, p. 48.

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. . . issue." While the statute does not explicitly describe the function to be discharged by the judicial officer, it may be fairly inferred that the function is ministerial rather than judicial. The statute[12] also provides that

> "A judge . . . may fine and imprison any person for contempt on account of his refusal to be sworn or answer questions as a witness."

This, it appears, is the only occasion that judicial discretion is permitted to the judge. He "may fine and imprison any person for contempt on account of his refusal . . . answer questions as a witness." This authority arises only upon the recalcitrance of a witness.

The legislative history of the act discloses that a prior enactment conferred, or attempted to confer, power to punish for contempt upon county attorneys. This was held to be an improper delegation of judicial authority upon the executive. (*In re Sims*, 54 Kan. 1.) The legislature then provided that the inquisition might be held before a judge for the sole purpose of compelling witnesses to testify upon pain of punishment for contempt. The question now arises: What is the correct character of the "judge" before whom an inquisition proceeding is held? Does that judge still wear his judicial hat, or is he now an inquisitor? Or does he acquire characteristics of both judge and inquisitor, and simultaneously discharge both functions?

Petitioners submit that the roles of judge and inquisitor are incompatible. A judge is by definition an im-

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12. Ibid. 48.

partial arbiter whose function is to assure the orderly administration of justice. An inquisitor, on the other hand, is of partisan stripe whose function is to elicit information and evidence to prove or disprove facts. A sinister connotation attaches to the latter because of society's unfortunate experience with inquisitors generally. Torqnuemada,, the Dominican of Segovia, Justice Hathorne of Salem, Baron Jeffreys of the "Bloody Assizes", and, not beyond the memory of living men, Isaac Parker, late of the Federal bench at Fort Smith, left their mark as judicial inquisitors. While their motives may have been impeccable in the frame of their contemporary societies, history has demonstrated that justice was poorly served by their assumption of the dual role of judge and inquisitor.

Petitioners urge that a presiding official at an inquisition proceeding, although he be a judge of a court of law, should not be permitted to exercise the judicial power and authority to convict and punish for contempt during the progress of the proceeding *in camera.*

The propriety of the designation by the legislature of a judicial officer to serve as the presiding official of an inquisition proceeding is not raised herein. However, it is earnestly submitted that where a judge is required to act in an extra-judicial capacity by law, he may not exercise his inherent judicial powers while so acting.

The Supreme Court of Kansas has disapproved the combination of executive and judicial authority and duties when they are required to be exercised simultaneously. It was said *In re Sims,* 54 Kan. 1, at p. 5:

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"It may be conceded that the legislature may confer judicial power on an individual who fills an executive office. The prior decisions go no further than this. The point here involved, whether executive and judicial power may be mingled and combined, may be exercised by the same person at the same time and in the same proceeding, has never yet been decided by this court.

" . . . Such a combination of powers is not in accordance with the theory of our government nor with the orderly administration of justice as administered in this country and in England. The power to punish for contempt is never exercised except by legislative bodies or judicial officers. (*Whitcomb's Case*, 120 Mass. 118; *Langenberg v. Decker*, 31 N. E. Rep. (Ind.) 190; *Kilbourn v. Thompson*, 103 U. S. 168; *Attorney General v. McDonald*, 3 Wis. 703.)"

In the *Oliver* case, supra, this court said, at p. 264:

"Many reasons have been advanced to support grand jury secrecy. See e. g., Hale v. Henkel, 201 U. S. 43 . . . State v. Branch, 68 N. C. 186 . . . But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict . . . Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one man grand jury may be, as Michigan holds, judicial in their nature, *the due process clause may apply with one effect on the judge's*

> *grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.*" (Emphasis supplied.)

It is unnecessary to dwell at length on the rationale of the Supreme Court of Kansas in the *Sims* case, or that of this court in the *Oliver* case. That rationale involves the doctrine of separation of powers, and the distinctions inherent in the administration of justice by duly selected judicial officers, and the duties of the executive branch of government. It is sufficient to say that the doctrine and the distinctions have been long recognized.

The question of the irregularity of the contempt proceedings in which petitioners were convicted and sentenced to jail was presented to the Supreme Court of Kansas in petitioners' brief on the original applications for writs of Habeas Corpus. The third division of the argument contained in that brief was preceded by a query as follows:

> "Does the failure to follow procedure prescribed by the Constitution and statutes of a state by a court in proceeding against persons charged with contempt, render the judgment and sentence for contempt of such persons invalid?"

In the discussion of the question presented it was said, at page 37 of the brief:

> "The petitioners submit that the proceeding before the District Court, *upon their refusal to testify changed from a statutory inquisition to a trial for criminal contempt;* and the character of petitioners

as *witnesses* changed to that *of persons charged with an offense.*" (Italics as appear in the original.)

• • •

"G. S. 1949, 20-1203 provides as follows:

'That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the Court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon.'

"However, it does not follow that the punishment provided by the statute can be so summary in character as to constitute an invasion of rights guaranteed persons accused of a criminal offense by the Constitution of Kansas and the rules of criminal procedure. In the instant case the petitioners were before the Court as witnesses in a secret inquisition. They were denied the right to confer with counsel, or the protection afforded by publicity. They refused to answer certain questions propounded by a special volunteer deputy county attorney. They were advised by the court that they were in contempt, and, continuing in their refusal, they were summarily adjudged in contempt and sentenced to the County jail. *At no time after their refusal to answer and prior to their sentences were they permitted to confer with counsel, nor was the public admitted to the Court Room.* They were immediately delivered to the respondent and placed in jail." (Italics as appear in the original.)

Respondent in his brief in opposition to the petition for certiorari has indicated that petitioners are presenting the question of the impropriety of the trial for con-

tempt in secrecy for the first time in this court. It is true that the term "due process of law" was not employed in the quoted portions of petitioners' brief. However, it is submitted that denial of due process of law is certainly implicit in the question propounded and the argument developed in the brief; and that the Supreme Court of Kansas might have fairly inferred from the question and argument presented that petitioners were denied the "civilized standards" demanded by the due process clause of the Fourteenth Amendment.[13]

The petitioners had earlier raised the issue of a public trial in the second division of their original brief and argument before the Supreme Court of Kansas. The pertinent portions of the brief are quoted in petitioners' Reply Brief to respondent's Brief in Opposition to the petition for certiorari herein.[14]

The Supreme Court of Kansas predicated the denial of petitioners' applications for writs of habeas corpus upon the proposition that the inquisition proceeding was not a criminal prosecution,[15] and that, therefore, petitioners were not entitled to a public hearing. It was said in the opinion of the court (R. 183).

> "There is nothing in the present statute which in anywise indicates a public hearing is contemplated."

The contention of petitioners that the character of the proceedings had changed from an inquisition to a criminal prosecution upon their refusal to answer, and that

13. State of Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, p. 468.
14. Reply Brief of Petitioners, pp. 2, 3.
15. In re Ferris, 175 Kan. 704, Syl. 3; R. 174.

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at that time they were entitled to the procedural standards required in prosecutions for contempt, was largely ignored by the Court below.

It is true petitioners advanced several objections to the validity of their convictions and sentences, some of which presented no federal question, and which are not urged here. It is reiterated, however, that petitioners raised and preserved the Federal questions here presented in their original applications for writs of habeas corpus,[16] in the affidavits attached to their reply,[17] and in their briefs and oral arguments before the Supreme Court of Kansas.

The petitioners have stated in their brief in support of their petition for certiorari that the summary manner in which they were convicted and the severity of the punishment inflicted raises the implication that the inquisition proceeding was punitive in character rather than investigative. They were not extended an opportunity to purge themselves of the contempt in the record of the proceedings before this court. Counsel for respondent on oral argument before the Supreme Court of Kansas indicated that petitioners would be extended an opportunity to purge themselves if it were requested. However, statements of counsel are not binding upon the committing official. As indicative of the true nature of the inquisition, a portion of the dissent filed by Justice Smith in the original proceeding in habeas corpus,[18] may be repeated:

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16. Appendix E, p. 54.
17. R. pp. 152, 153, 154, 155 and 156.
18. In re Ferris, 175 Kan. 774; R. 189.

> "A persuasive incident to me is that when these men were sentenced, in one case to three months and in the other cases to a year in the county jail, the sentences were not in the alternative that they should purge themselves of contempt, but were direct sentences to that much of a term in the county jail.
>
> "The entire affair was punitive and not in the interest of obtaining evidence. Had the investigation been carried on in good faith the sentences would have been, petitioners should be confined in the county jail for the terms indicated or until they should purge themselves of contempt."

The authorities are in complete agreement that an accused's right to the public trial of criminal offenses with which he is charged is of a fundamental character. In the recent case of *People v. Jelke*, (1954) 130 N. Y. S. 2d 662, the Appellate Division of the Supreme Court of New York (1st Dept.) quoted with approval the comments of the Judicial Council of New York, in its opinion at p. 678:

> "'It is further recommended to include sodomy in this section in conformity with the dictum in People v. Hall, 51 App. Div. 57, (4th Dept. 1900) (64 N. Y. S. 433) . . .
>
> "That the protection of a public trial must be given to every defendant charged with a crime is obvious. No court in this nation has ever held otherwise, so far as I am able to ascertain. That principle must be held unimpaired, but its retention does not entirely wrest from the trial judge the discretion to conduct the trial is such wise as to be consonant with good morals and common decency and in an orderly manner'."

The *Jelke* Case, supra, was determined on the issue of the exclusion of the press and public from a *portion*

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of the proceedings, "in the sound administration of justice, and in the interest of good morals."[19] In a dissent filed by Callahan, J., and joined by Dore, J., it was said:

> "There were present in the courtroom, however, during the People's case, in addition to the jury, counsel for defendant and the People, the court personnel, including stenographers, and as many as seventeen different members of the public, all friends of the defendant and selected by him or his lawyer. Sometimes as many as twelve, sometimes less, but always at least one of these persons was in attendance at the various sessions of the court throughout the trial, including the People's case."

Yet in the face of the facts as stated in the dissent above quoted, it was said in the majority opinion:[20]

> "It is unnecessary to speculate as to whether or not the defendant was prejudiced. In United Press Ass'ns v. Valente, 281 App. Div. 395, 399, 120 N. Y. S. 2d 174, 178, it was said 'the decisions are practically unanimous that a judgment of conviction is reversed on appeal by a defendant, without any affirmative showing of prejudice, if he has not had nor waived a public trial. In that event prejudice is presumed. (Citing Cases.)' "

The case of *People v. Byrne*, (Cal. 1948) 84 CA 2d 72, 190 P. 2d 290, involves some of the most startling facts to be encountered in modern reports. The appellant was convicted in 1932 on eight separate counts of kidnapping, forcible rape, perversion and simple assault, under two indictments. He was sentenced to im-

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19. People v. Jelke, 130 N. Y. S. 2d 662, 671.
20. Ibid. p. 680.

prisonment on each count of the indictments; the sentences to run consecutively. He had served the sentences imposed under the first indictment, and at the time of the appeal, the appellant was serving the sentences imposed under the second. The facts of the case are stated in a companion appeal.[21] The only issue considered in the cited case was the defendant's contention that he had been denied a public trial. At the commencement of the trial the prosecutors moved that the case be heard behind closed doors. Appellant's objection was overruled and the trial court ordered " . . . all persons except the defendants, counsel, officers of the court, jurors and those having business with and in the court will be excluded . . . " Presumably this order was carried out and the case was tried under the conditions stated in the order. The California appellate court commented upon the evidence in its opinion in the companion appeal[22], saying:

> "In its mildest form it will be a nauseating recital of depravity, brutality and hideous torture on the part of Byrnes, compared with which the mere slaying of his victim might well have been an act of mercy."

A new trial was ordered in spite of the court's obvious revulsion and horror of the criminal acts of the appellant, and the obscene and sensational nature of the evidence adduced at the trial. It was said in the opinion, at P. 293:

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21. People v. Byrnes, 190 P. 2d 286.
22. Ibid., p. 287.

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"There is not much to be said with reference to the claimed discretion of the court to exclude the public solely upon the ground of the salacious nature of the testimony . . . The exclusion of the general public upon this ground alone was a violation of the defendants constitutional right. What we have said is not intended to apply to a situation in which it would appear to the court that a material witness, because of emotional disturbance, would be substantially prevented from giving testimony in the presence of a crowd of spectators.

"In considering further the matter of the presumption of prejudice we shall extend some of the views previously expressed . . . The question whether the trial was public and the question whether actual prejudice was shown have occasionally been considered together as if the latter were controlling . . . and some courts have reached the conclusion that if the presence of a few spectators is permitted this gives the trial a public character, if no actual prejudice be shown. This, as we have pointed out, is merely to hold that the accused is not entitled to a public trial in the true sense.

"The right to a public trial, in this respect, is comparable to the rights of trial by jury and to the assistance of counsel. They stand on the same footing. All questions as to whether these rights are essential for the protection of the substantial rights of the accused were settled affirmatively by the adoption of section 13 of Article I.[23] There can be no inquiry into the matter, so far as the right to a public trial is concerned, other than in the exceptional cases heretofore mentioned.

"A judgment of conviction, where the defendant has demanded and been refused a public trial, can-

23. Section 13, Article I of the Constitution of California, which guarantees an accused the right to a public trial.

not be allowed to stand, even against the meanest criminal in the land, however guilty he may be of the offenses charged."

It thus appears that the modern cases recognize and hold that prejudice to an accused by reason of the denial of a public trial need not be established to secure a reversal of a conviction where the accused was denied a public trial.

It is submitted, however, that the conviction and sentence of the petitioners in the instant case "behind locked doors and in the presence only of officers of the court whose interests in the minds of the petitioners were inimically opposed to theirs"[24] was prejudicial to the petitioners. It is certainly not beyond the realm of possibility that had they been advised by friends or by counsel of their choice as to the possible consequence of their refusal to answer the petitioners might well have purged themselves of the contempt and the inquisition could have proceeded. In the circumstances in which petitioners found themselves, alone and confronted by officers of the law who were pledged to "stop the violence"[25] which to petitioners could only mean to "stop the strike", their summary conviction and sentence to jail for direct contempt of court fell far short of the procedure required by the due process clause of the Fourteenth Amendment.

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24. Brief in support of petition for certiorari, p. 13.
25. Statements of Mr. Paul R. Kitch, Special Deputy County Attorney, at pages 99, 105 and 143 of the Record.

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The question of whether the due process clause of the Fourteenth Amendment includes within its scope the right to a "public" trial was raised in *Gaines v. State of Washington*, (1928), 277 U. S. 81. In considering the question, but not passing upon it, this court said, at p. 85:

> "It is contended, however, that due process of law exacted in causes tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials. The question has not been answered in any case cited to us. It would involve a consideration of whether due process requires more than a trial that is not private or secret, or whether due process would not be satisfied except by such restriction upon the discretion of the court in regulating attendance as the defendant here insists upon and as is held in some of the authorities cited above in enforcing the Sixth Amendment and similar constitutional provisions of an affirmative character. But we need not pass on that question now."

The question was again before this court in *Re William Oliver*, 333 U. S. 257; and in determining it, it was said, at p. 273 of the opinion:

> "In the case before us, the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a "trial", the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to prison—still without a break in the secrecy . . . In view of the nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Four-

teenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sent to prison."

It is submitted that in the instant cases petitioners were deprived of their liberty at a criminal trial conducted in disregard of the requirement imposed by the due process clause of the Fourteenth Amendment to the Constitution of the United States, that persons accused of criminal offenses in state courts be afforded due process of law; and the procedure established by Section Ten of the Bill of Rights of the Constitution of the State of Kansas, that criminal trials be public. It is further submitted that under the facts and circumstances of the instant cases, the accusations, trials, convictions and commitment to jail of the petitioners in secrecy constituted an abridgement of the procedural due process of law guaranteed by the State and Federal Constitutions; and, therefore, the convictions and sentences imposed upon petitioners are invalid and they are entitled to discharge from the custody of the respondent herein.

POINT B.

Petitioners submit that the failure to afford them an opportunity to confer with counsel of their own choice or to secure the assistance of counsel, when the character of the proceeding changed from an inquisition to a trial for contempt, was a denial of the procedural due process required by the Fourteenth Amendment to the

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Constitution of the United States, and Section Ten of the Bill of Rights of the Constitution of Kansas.[26]

In its opinion in the instant case the Supreme Court of Kansas, summarizing petitioners' complaint, said:[27]

> "Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them and without evidence or counsel."

The opinion proceeds to discuss the appropriate section[28] of the statutes which provides for summary disposition of direct contempts. That section provides in part:

> ". . . a direct contempt may be punished summarily, without written accusation against the person arraigned . . ."

The opinion continues:[29]

> "Here we are concerned only with a direct contempt of court committed in the presence of the presiding judge who had personal knowledge of exactly what transpired."

The Supreme Court of Kansas, in effect, held that the summary conviction and sentence of the petitioners, in secrecy and without counsel, was proper. In support of its ruling the court cited *Savin, Petitioner*, 131 U. S. 267, and *Cooke v. United States*, 267 U. S. 517. The facts of the cited cases disclose that in both the con-

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26. Appendix B, p. 47.
27. In re Ferris, 175 Kan. 704, 713; R. 185.
28. Appendix C, p. 51.
29. In re Ferris, 175 Kan. 704, 714; R. 186.

temnor was convicted and sentenced in *open* court. In the *Savin* case the accused was represented by counsel, and in the *Cooke* case the accused was a member of the bar, and practicing before the court which convicted him of contempt.

In *Cooke v. United States,* supra, the petitioner, a member of the bar, had written a letter to the judge of the United States District Court for the Northern District of Texas, in which he expressed dissatisfaction with the manner in which the judge had tried a case in which certain post trial motions were then pending, and which contained an informal request that the judge disqualify himself to hear certain other cases pending in the court. The judge issued an order of attachment for the petitioner Cooke and his client, and after a hearing convicted them of contempt and sentenced each of them to thirty days in jail. This court said in its opinion, at p. 537:

> "Due process of law, therefore, in the prosecution of contempt, *except that of contempt in open court,* requires that the accused should be advised of the charges and have a reasonable opportunity to meet them. *We think this includes the assistance of counsel, if requested,* and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, 12 Fed. Cas. 359, 360; In re Stewart, 118 La. 827, 43 So. 4 JS; Ex parte Clark, 208 Mo. 121, 106 SW 990, 15 L.R.A. (N.S.) 389.
>
> "The proceeding in this case was not conducted in accordance with the foregoing principles . . .

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> "After the court had elicited from the petitioner the admission that he had written the letter, the court refused him time to secure and consult counsel, prepare his defense, and call witnesses, and this, although the court itself had taken time to call in counsel as a friend of the court." (Emphasis supplied.)

It clearly appears from the foregoing that this court has recognized the right to assistance of counsel as part of the due process of law required in prosecutions for contempt of court. Petitioners concede that the cited case comes within the scope of the Fifth and Sixth Amendments, rather than the Fourteenth, as the prosecution for contempt was conducted in Federal Court. It is, however, urged that assistance of counsel is an essential portion of the procedural due process of law required by the Fourteenth Amendment.

The cited case *(Cooke v. United States)* distinguishes between prosecutions for contempt "in open court" and prosecutions for other contempts. It is submitted that the distinction is applicable in the instant case. In the *Cooke* case, it was said, at p. 534:

> "To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so, and the punishment imposed is due process of law. Such a case had great consideration in the decision of the court in ex parte Terry, 128 U. S. 289 . . .

"The important distinction between the Terry case and the one at bar is that this contempt was not in open court . . .

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"We think the distinction finds its reason, not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice,' as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual indispensable hearing before judgment constituting due process that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.

"*When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument.*" (Emphasis supplied)

It is clear from the record in the instant case, the opinion of the court below, and the statement of counsel for respondent[30] in his brief in opposition to the petition for certiorari, that the petitioners were convicted of contempt *in camera,* and that the public was excluded. There can be no contention made by respondent that petitioners' alleged contempt was committed in open court, or that petitioners were afforded an opportunity

30. Brief for Respondent in Opposition, p. 1.

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to confer with counsel or otherwise defend themselves during the subsequent proceedings in which they were convicted of criminal contempt. Petitioners submit that in those circumstances, their punishment without trial or hearing and without the advice of counsel constituted a denial of due process of law.

The record of the proceedings [31] and the journal entry [32] of judgment in the case of Ferris, indicates that the petitioner refused to answer any questions on the stated grounds that "It would be in violation of the 14th Amendment. I have no legal counsel and (it) is a violation under Kansas law" and "The whole procedure is illegal under Kansas law." If these contentions of the petitioner were correct a conviction of contempt was plainly improper. However, he was not allowed a hearing or assistance of counsel to present his contentions to a court before he was convicted and sentenced for contempt. It is true that the Supreme Court of Kansas has, in effect, held that the petitioner's contentions were insufficient to justify his refusal to answer the questions propounded. However, that ruling was made in the habeas corpus proceeding, and not in the proceeding which resulted in the petitioner's conviction. It is submitted that the petitioner was at least entitled to a full and fair hearing of the matters he offered in his defense in open court and with the assistance of

31. Record, p. 37.
32. Record, p. 36.
33. Record, p. 134.
34. Record, p. 48.

counsel before he could be convicted and sentenced to jail for contempt of court.

The transcript of the inquisition proceedings [33] and the journal entry [34] in the case of the petitioner Courtney indicates that the petitioner testified at considerable length with reference to the possession of a certain fluid, apparently used in the manufacture of "stench bombs." He was then asked by a deputy county attorney:

Q. What have you done with it?
A. I didn't do nothing with it. Somebody took it from my car and I don't know who it was.

Q. Who did you tell that it was in your car?
A. Who did I tell?

Q. Yes.
A. I didn't tell nobody.

Q. How did they know it was in your car?
A. I imagine Black knew I was going to go get it, I don't know what he done with it.

Q. How did Blacky know that you were going to go get it?
A. I don't know.

Q. Now did you say you did not turn that over to somebody else down at strike headquarters, do you want us to believe that?
A. (No answer.)

Q. Will you answer the question?

The Court: Answer the question.

A. Well, I don't know whether I want you to believe it or not, that is up to you.

Q. Who did you give it to when you took it down to strike headquarters?
A. I object.

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The Court: You will be required to answer.

A. I object.

The Court: You are required to answer, Mr. Courtney. The question is, who did you give it to down at strike headquarters, who did you turn it over to?

A. I object.

The Court: You refuse to answer.

A. Yes, sir.

The Court: You refuse to answer. The only alternative the court has is to punish you for contempt and the court doesn't want to do that to you, Mr. Courtney.

A. I am aware of that fact, your Honor, but I am not going to rat on anybody that I know anything on. If I knew anything I wouldn't tell it, I don't know anything and I ain't going to tell it.

The Court: You are going to refuse to answer this last question as to who you gave it to down at strike headquarters?

A. Yes, sir.

The Court: It is the sentence of this court that you be sentenced to 90 days in the county jail. Take him over.

It may be well argued that the petitioner had answered the questions propounded by the county attorney and the court. He was asked what he had done with the fluid—he answered that someone took it from his car and he did not know who it was. He thought a person named Black or Blacky knew he was going to get the fluid. The question was repeated in substance, and the petitioner objected. The court repeated the question and the petitioner again

objected. He then made a statement which is subject to construction: Construed favorably, it could be understood as though the petitioner had said: "I am not going to inform on parties that I know nothing about; even if I knew anything I would not tell it, but I do not know anything."

The petitioner's statement brought the proceeding to an abrupt close. He had been interrogated for several hours, as evidenced by over thirty pages of testimony in the record.[40] The petitioner could well have been confused; certainly, it appears his interrogators lost the thread of questioning, or else they were attempting to force the petitioner to change his testimony to conform with some preconception of the facts which the interrogators had. In any event, the petitioner was not given an opportunity to make a defense to the charge of contempt, or to consult with counsel before he was summarily sentenced to ninety days in jail. It is submitted that the proceeding which culminated in the sentence to jail was devoid of the barest requirements imposed by the due process clause of the Fourteenth Amendment.

Again, the transcript of the proceeding[41] at which the petitioner Parks was convicted and sentenced for contempt indicates that the petitioner submitted grounds for his refusal to testify in the form of a letter addressed to the Business Representative of the union from its attorneys.[42] As in the case of the petitioner, Ferris, if the

40. Record, pp. 104-136, inclusive.
41. Record, pp. 92 to 98 inclusive.
42 Record, p. 90.

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grounds upon which the petitioner Parks relied for his refusal to testify were valid he was not in contempt for his refusal to answer. However, the petitioner was not given a chance to litigate the questions raised nor was he afforded an opportunity to consult with counsel before he was arbitrarily sentenced to jail for one year for contempt of court.

This peremptory and harsh treatment of the petitioners by their inquisitors was shown to the Supreme Court of Kansas. Justice Smith, in his dissenting opinion,[43] said:

> "It should never be overlooked, the qualification and the only qualification for an inquisition is to obtain information. It is not punitive. The state in these proceedings argues in one breath the purpose is as above, hence the constitutional safeguards do not apply, and in the next breath conducts the inquisition so that the net result is punitive.
>
> "Should these petitioners see fit to stay in jail for the terms for which they were sentenced, and there is no indication they may be afforded an opportunity to do otherwise, then the end the state advances in the inquisition will be defeated.
>
> "Actually the state is by this proceeding avoiding the necessity for calling a grand jury. This is a time honored institution for which our statutes still provide. It is calculated to safeguard the rights of witnesses as well as to aid in intelligent law enforcement.
>
> "Granting for the sake of argument that the inquisition had a legal basis, still I am convinced the record in this case requires the granting of these

43. In re Ferris, 175 Kan. 704, 718; Record p. 191.

writs. G.S. 1949, 62-301, provides among other things: A witness may be imprisoned for contempt for any refusal to answer questions. This must be construed to mean any proper questions or any question asked for the purpose of securing information bearing on the commission of any crime. That must be the proper construction since such is the only reason to justify an inquisition such as this. Obviously before a witness could be punished for contempt for refusing to answer a question, it must appear he was in possession of some such information. The matter of the testimony of Courtney, who was sentenced to three months in jail, has been dealt with already in this dissenting opinion. In the cases of Ferris and Parks, each of whom was sentenced to a term in jail of a year, the transcript of the proceeding attached to the sheriff's return shows the only question asked either one of them bearing on his possession of information was whether he was a striking taxicab driver. There was no testimony whatever that either one of them knew any facts useful to the state. No questions were asked bearing upon the commission of any acts of violence.

"These petitioners have been deprived of their liberty for a year. In my opinion where such a judgment is entered, be it the result of a conviction before a jury, or after a contempt proceeding, the basis therefor should be clear and free from doubt.

"It is my opinion, the orders sentencing these petitioners were arbitrary and unreasonable and in making them the court abused its discretion. The fact that these sentences did not offer the petitioners the privilege of purging themselves of contempt by testifying adds weight to the above conclusion."

This court has stated that the right to assistance of counsel is a fundamental element of procedural due pro-

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cess of law. *Powell v. Alabama*, 287 U.S. 48, 67. The record discloses that the union, of which all the petitioners were members, had legal counsel,[44] and it can be fairly inferred that such counsel was available to advise and defend the petitioners in the contempt proceedings, had an opportunity been afforded petitioners to secure such counsel. Petitioners do not complain that the judge-inquisitor refused to appoint counsel to assist in their defense. It is submitted, however, that the failure to allow petitioners to confer with counsel, or to secure the assistance of counsel of their own choice, who were ready and willing to assist petitioners in their defense, deprived them of a fundamental element of procedural due process of law.

This is not a situation comparable to the facts presented by *Betts v. Brady*, 316 U.S. 455, where an accused requested the trial court to appoint counsel for him. Petitioners submit that the denial of assistance of counsel to persons accused of criminal offenses, where such persons desire counsel and are prepared to provide counsel, is a denial of procedural due process of law. *Powell v. Alabama*, supra; *Grosjean v. American Press Co.*, 297 U.S. 233, 243, 244; *Brown v. Mississippi*, 297 U.S. 278, 286.

In the *Oliver* case, 333 U.S. 257, it was said, at p. 275:

> "Except for a narrowly limited category of contempts, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right

---

44. Record, p. 90.

to assistance of counsel, and have the right to testify and call other witnesses in his behalf either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority . . . before the public . . .'

"The facts shown by this record put this cause outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret there could be no possibility of a demoralization of the court's authority before the public . . ."

The language quoted from the cited case can be applied with equal force in the instant case. It is submitted that the convictions and sentences of the petitioners are so permeated with illegality that they cannot be allowed to stand. There can be no question that petitioners were deprived of their liberty without regard for the procedural due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and by the historical institutions of the common law.

CONCLUSION.

In conclusion it is submitted that the Due Process Clause of the Fourteenth Amendment to the Constitution exacts in criminal causes tried in state courts certain civilized standards of procedure, among which are the right to a public trial and the right to assistance of counsel by persons charged with contempt of court, not committed in open court and not tending to demoralize the court's authority before the public.

It is further submitted that the record herein discloses that the petitioners were convicted and sentenced to jail for criminal contempt of court in proceedings from which the public was excluded, and in which they were denied assistance of counsel and an opportunity to be heard in defense of the criminal charges.

It is therefore requested that the decree of the Supreme Court of Kansas denying the applications of the petitioners for writs of habeas corpus be reversed and remanded to that court with instructions to dispose of the said ap-

plications for writs of habeas corpus in a manner consistent with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
Attorney for Petitioners.

LOUISE MATTOX,
PAYNE H. RATNER, JR.,
RUSSELL CRANMER,
DALE B. STINSON, JR.,
CARROLL F. POPE,
KEITH EALES,
CLIFF W. RATNER,
WILLIAM L. FRY,
A. WAYNE MURPHY,
Wichita, Kansas,
of Counsel.

APPENDIX A.

Amendment 14 to the United States Constitution.—RIGHTS AND IMMUNITIES OF CITIZENS:

Section 1. *Citizenship; privileges or immunities; due process clause.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B.

Section Ten of the Bill of Rights of the Constitution of the State of Kansas:

Trial, defense of accused. In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense.

APPENDIX C.

General Statutes of Kansas, 1949:

Section 62-301. *Inquisitions; subpoena of witnesses; penalty for disobedience; immunity of witnesses.* If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other person or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him, at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state. Such subpoena may be served by the sheriff or any constable of the county, or by any other

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person, a citizen of the county, and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and returned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or any refusal to be sworn as a witness or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the county attorney, atttorney general or assistant attorney general, in such inquiry shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment. If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attor-

ney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state.

* * *

Section 20-1201. *Two Classes of Contempts.* That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

Section 20-1202. *Classes of Contempts defined.* That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts.

Section 20-1203. *Direct contempts.* That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon.

• • •

Section 20-302. *Powers of judges.* The judges of the district courts, within their respective districts, shall have and exercise such power in vacation or at chambers as may be provided by law, and shall also have power in vacation to hear and determine motions to vacate and modify injunctions, discharge attachments, vacate orders of arrest, and to grant or vacate all necessary interlocutory orders, and to punish for contempt in open court or at chambers, by fine, not to exceed one hundred dollars, and imprisonment, or either, and to assign not exceeding one attorney to prisoners who may be unable to employ counsel.

APPENDIX D.

THE COMPILED LAWS OF THE STATE OF MICHIGAN, 1929.

Chapter VII

Grand Juries, Indictments, Informations and Proceedings before Trial: • • •

17217. Proceedings before Trial; summoning witness, inquiry, compensation. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

• • •

17218. Same; apprehension of suspected person, finding, disclosure of statement. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense

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has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or public body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inqury, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

• • •

APPENDIX E.

Original Applications:

IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 39,454

In the Matter of the Application of Phillip T. Ferris for a Writ of Habeas Corpus—Filed January 20, 1954.

STATE OF KANSAS,

Sedgwick County, ss:

To the Supreme Court of the State of Kansas:

Your petitioner, Phillip T. Ferris, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant or order of attachment for a period of hours, after which period and at or about 5:30 P. M., of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath.

Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioners refusal to answer certain questions propounded by the said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for the period of one year for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was threfore without

jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitutiton of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

Wherefore, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

Philip T. Ferris

Duly sworn to by Phillip T. Ferris.
Jurat omitted in printing.

AFFIDAVIT IN SUPPORT OF APPLICATION

STATE OF KANSAS,
Sedgwick County, ss:

Phillip T. Ferris, of lawful age, being first duly sworn upon oath, for his Affidavit states:

That he is the petitioner in the above entitled matter; that the above entitled matter seeks the remedy of the writ of habeas corpus directed to the Sheriff of Sedg-

wick County, Kansas; that the original jurisdiction of this Court is invoked for the reason that your petitioner is committed to the custody of the Sheriff of Sedgwick County, Kansas, by the judgment and order of the District Court of said County for contempt of said Court; that no other Court of concurrent or superior jurisdiction exists in said county; that original jurisdiction of proceedings in habeas corpus is conferred upon this court by Article III, Section 3, of the Constitution of the State of Kansas.

Further affiant saith not.

Philip T. Ferris.

Subscribed and sworn to before me, the undersigned Notary Public, this 20th day of January, 1954, Louise Mattox, Notary Public. My Commission Expires Jan. 6, 1955. (Seal)

IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 39455

In the Matter of the Application of Cecil L. Courtney for a Writ of Habeas Corpus—Filed January 20, 1954.

STATE OF KANSAS

Sedgwick County, ss:

To the Supreme Court of the State of Kansas:

Your petitioner, Cecil L. Courtney, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that

the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant or order of attachment for a period of hours, after which period and at or about 5:30 P. M., of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath. Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioner's refusal to answer certain questions propounded by the said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for the period of one year for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedg-

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wick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

Wherefore, Your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

Duly sworn to by Cecil L. Courtney.

Jurat omitted in printing.

AFFIDAVIT IN SUPPORT OF APPLICATION

STATE OF KANSAS

Sedgwick County, ss:

Cecil L. Courtney, of lawful age, being first duly sworn upon oath, for his Affidavit states:

That he is the petitioner in the above entitled matter; that the above entitled matter seeks the remedy of the writ of habeas corpus directed to the Sheriff of Sedgwick County, Kansas; that the original jurisdiction of this Court is invoked for the reason that your petitioner is committed to the custody of the Sheriff of Sedgwick County, Kansas, by the judgment and order of the District Court of said county for contempt of said Court; that no other Court of concurrent or superior jurisdiction exists in said county; that original jurisdiction of proceedings in habeas corpus is conferred upon this court by Article III, Section 3, of the Constitution of the State of Kansas.

Further affiant saith not.

Cecil L. Courtney.

Subscribed and sworn to before me, the undersigned Notary Public, this 20th day of January, 1954. Louise Mattox, Notary Public. My Commission expires Jan. 6, 1955. (Seal.)

IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 39,459

APPLICATION FOR WRIT OF HABEAS CORPUS

In the Matter of the Application of Ray Parks for a Writ of Habeas Corpus—Filed Jan. 22, 1954.

STATE OF KANSAS

Sedgwick County, ss:

To the Supreme Court of the State of Kansas:

Your petitioner, Ray Parks, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 19, 1954, your petitioner was served with a forthwith subpoena issued by the District Court of Sedgwick County, Kansas, and was bodily taken by the servers thereof to the office of the County Attorney of Sedgwick County, Kansas, and was there held from the approximate time of 3:30 p. m. on said date until approximately 10 p. m., on said date, at which time petitioner was released and instructed by Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, to return to said court at 5:30 p. m. on January 20, 1954. That your petitioner did appear before said Judge at said time and place and was held in the office of the County Attorney of Sedgwick County, Kansas, until approxi-

mately 6:30 p. m., on said 20th day of January, 1954, at which time your petitioner was brought before Judge Howard C. Kline, Judge of Division 2, of said District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special Deputy County Attorney of said County, after first being sworn upon oath. Upon your petitioner's refusal to answer questions propounded by said special County Attorney, interrogation was continued by the said Judge. Upon your petitioner's refusal to answer questions propounded by said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for a period of one year for contempt of the said court, and was held in the office of the County Attorney of said County until approximately 7:30 p. m., on January 20, 1954, at which time your petitioner was delivered into the custody of Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the County Jail of said county.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was subpoenaed under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special Deputy County Attorney and the Judge of said District Court.

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II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

IV. That your petitioner, although requesting permission to have advice of counsel, was denied by said Judge the right to counsel at all stages of said proceeding prior to petitioner's being found in contempt of said court as hereinbefore stated.

Wherefore, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

Duly sworn to by Ray Parks.
Jurat omitted in printing.

AFFIDAVIT IN SUPPORT OF APPLICATION

STATE OF KANSAS,

Sedgwick County, ss:

Ray Parks, of lawful age, being first duly sworn upon oath, for his Affidavit states:

That he is the petitioner in the above entitled matter; that the above entitled matter seeks the remedy of the writ of habeas corpus directed to the Sheriff of Sedgwick County, Kansas; that the original jurisdiction of this Court is invoked for the reason that your petitioner is committed to the custody of the Sheriff of Sedgwick County, Kansas, by the judgment and order of the District Court of said County for contempt of said Court; that no other Court of concurrent or superior jurisdiction exists in said county; that original jurisdiction of proceedings in habeas corpus is conferred upon this court by Article III, Section 3, of the Constitution of the State of Kansas.

Further affiant saith not.

Ray Parks.

Subscribed and sworn to before me, the undersigned Notary Public, this 21st day of January, 1954. Louise Mattox, Notary Public. My commission expires: Jan. 6, 1955. (Seal.)

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Office - Supreme Court, U.
FILED
FEB 2 1955
HAROLD B. WILLEY, Cler

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 179

CECIL L. COURTNEY, PHILIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PETITIONERS.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas,
Attorney for Petitioners.

LOUISE MATTOX,
PAYNE H. RATNER, JR.,
RUSSELL CRANMER,
DALE B. STINSON, JR.,
CARROLL F. POPE,
KEITH EALES,
CLIFF W. RATNER,
WILLIAM L. FRY,
A. WAYNE MURPHY,
444 North Market,
Wichita, Kansas,
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 179

CECIL L. COURTNEY, PHILIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PETITIONERS.

STATEMENT.

Petitioners deem it necessary to file a brief in reply to the brief for respondent to refute the arguments made and to correct certain erroneous statements contained therein.

SUMMARY OF ARGUMENT.

I.

The Federal questions specified in the Petition for Certiorari were before the Supreme Court of Kansas, and decided adversely to petitioners. *In re Ferris,* 175 Kan. 704. (R. pp. 180-182-185)

Where a Federal question is raised and the judgment of a lower court could not have been reached without tacitly or implicitly deciding the Federal question, this Court will take jurisdiction; although the opinion below does not expressly determine the question raised, or says nothing about it. *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S. 1.

Meticulous insistence upon formal regularity is foreign to the purposes of habeas corpus. *Gibbs v. Burke*, 337 U. S. 773.

Where the full record and undisputed references to the briefs of the parties indicates that Federal questions were raised in the court below in habeas corpus proceedings and determined therein this Court may assume jurisdiction on certiorari.

II.

Habeas corpus is proper under Kansas law where the jurisdiction of the court under whose process petitioners are deprived of their liberty is questioned. *In re Dill*, 32 Kan. 668; *In re Jewett*, 69 Kan. 830; *Wallace v. Weber*, 134 Kan. 201; *Whalen v. Cristell*, 161 Kan. 747.

Respondent's objection to the jurisdiction of the Supreme Court of Kansas is res judicata as that court determined the jurisdictional issue adversely to respondent in the habeas corpus proceeding. *Woolsey v. Best*, 299 U. S. 1; *Ex parte Spencer*, 228 U. S. 652.

Where a state court treats habeas corpus as permissible and hears a petition therefor on its merits, no question of state procedure for reexamination of criminal con-

victions by direct appellate review arises. *Brown v. Allen*, 344 U. S. 443; *Hawk v. Olson*, 326 U. S. 271; *Herndon v. Lowry*, 301 U. S. 242.

III.

Contempts subject to summary punishment are those committed in open court and which if not summarily punished would tend to discredit the authority of the court in the eyes of the public. *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257; *Sacher v. United States*, 343 U. S. 1.

A judgment of conviction for contempt of court must be rendered in public. *Re William Oliver*, supra; *Sacher v. United States*, supra.

The judicial power to summarily punish for contempt is limited to that necessary to preserve order and decorum in court, and to compel obedience to valid orders of the court; and should not be exercised in the latter instance without observing due process of law. *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (dissent); *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257; *Sacher v. United States*, 343 U. S. 1 (dissent).

ARGUMENT AND AUTHORITY.

I.

Respondent asserts:

> "This court is without jurisdiction since the questions presented herein were not raised below or called to the attention or decided by the state court."

Respondent states that the case at bar is governed by *McGoldrick v. Compaignie Generale Transatlantique*, 309 U. S. 430, wherein it was said, at p. 434:

> " . . . In cases coming here from state courts, *in which a state statute is assailed as unconstitutional there are reasons* . . . which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed *to set aside legislation as unconstitutional on* grounds not porperly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." (Emphasis supplied)

Petitioners submit that the validity or constitutionality of the statute pursuant to which the inquisition in the instant case was conducted has not been contested at any stage of the proceedings herein. In support of this, petitioners cite *In re Ferris*, 175 Kan. 704, 267 P. 2d 190, R. 179, wherein the Supreme Court of Kansas, after reciting the inquisition statute verbatim, said:

> "Counsel for petitioners, with commendable frankness, concede that the time of the inquiry they believed the inquisition was 'entirely legal' but that it was conducted in an illegal manner in certain par-

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ticulars. They now state the inquisition was wholly illegal and that the above statute does not authorize it."

The position of counsel for petitioners to which the opinion refers, and as appears elsewhere therein, was that the inquisition statute was limited by its terms to inquiries into three specific types of offenses. The Supreme Court of Kansas held contra, and petitioners are bound thereby and have not and do not now complain of that particular ruling in this Court. The validity or constitutionality of the statute referred to was never questioned below or here. It is clear, therefore, that *McGoldrick* does not control the case at bar.

Petitioners submit, however, that the Federal questions specified in their petition for certiorari were before the Supreme Court of Kansas, and its judgment or decree could not have been pronounced without deciding them.

It should be borne in mind that (as appears in the record, pp. 1 to 8) Ferris and Courtney were convicted and sentenced sometime after 5:30 p. m. on January 18; their applications for writs were filed in the Supreme Court of Kansas on January 20. Parks was convicted after 6:30 p. m. on January 20, and his application for a writ was filed on January 22. Petitioners, after sentence, were immediately committed to the county jail of Sedgwick County, at Wichita. The applications for the writs were filed in the Supreme Court, at Topeka, 175 miles away, as soon as humanly possible in order to effect the release of petitioners from the alleged illegal restraint.

The applications were necessarily hastily drawn but, nevertheless, squarely presented the Federal issues stated in the petition for certiorari. They recite in part:

> "Your petitioner further shows this court that the said District Court . . . has exceeded the authority conferred upon it by G. S. 1949, 62-301, *by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel* . . . (Emphasis supplied)
>
> " . . . that your petitioner has been deprived of his liberty without due process of law . . . " (R. pp. 1 to 8)

The proceeding at which the applications were heard was original in the Supreme Court. No evidence or testimony was taken, but, nevertheless, the many affidavits and exhibits which were submitted by petitioners and respondent, the briefs of the parties and amicus curiae, and the oral arguments which were considered by the Supreme Court of Kansas clearly presented the constitutional questions. That the court below was aware of the Federal nature of the issues involved and recognized their import is indicated in its opinion, where it is said (R. 180):

> "Petitioners assert the inquisition, *as conducted*, violated the fifth, sixth and fourteenth amendments to the federal constitution and section ten of the Kansas bill of rights. The pertinent portion of the fifth amendments reads: (Emphasis supplied by petitioners)
>
> 'No person shall be . . . compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . .' (Our italics)

"The sixth amendment, insofar as material provides:

'In all *criminal prosecutions*, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.' (Our italics)

"The essential part of the fourteenth amendment states:

' . . . No state shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law* . . .'" (Our italics)

As can be readily observed, the Supreme Court of Kansas not only recognized the portions of the Federal Constitution which petitioner contended were involved, but emphasized the phrases which it considered particularly pertinent.

Petitioners frankly concede that at the outset of this litigation they were convinced that they were entitled to discharge under the laws and constitution of the state, and placed their reliance largely upon legal authorities and arguments to that end. However, it is also asserted that the Federal questions, express and implicit, involved were urged upon the court below and never relinquished, as evidenced by the fourth paragraph of petitioners' motion for rehearing (R. 193) where they said:

> "Petitioners respectively (sic) urge the court to reconsider the Constitutional and Federal questions heretofore raised."

Pointing further to the existence and recognition of the Federal questions which petitioners raised below and

which are now relied upon here, is the statement of the supreme court in its opinion (R. 185):

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel."

The court below does not mention the secrecy which petitioners also asserted in their applications for writs (R. pp. 1 to 8) and in their affidavits attached to their replies (R. pp. 152, 153, 154, 155), but which clearly appears in the record.

A careful reading of the opinion below discloses that the Kansas court disposed of the federal questions on the bases that the fifth and sixth amendments pertained only to criminal prosecutions, and in any event, would not apply to the power of the state with respect to its own citizens. It was said in the opinion (R. 182):

> "It must be remembered constitutional guaranties relied upon by petitioners, *except the fourteenth amendment* to the federal constitution, apply only to criminal prosecutions." (Emphasis supplied)

The court directly held that the inquisition was not a criminal prosecution and that the fifth and sixth amendments were not applicable. However, no further reference is made to the fourteenth amendment which petitioners contended conferred the privileges and immunities afforded by the fifth and sixth amendments to the petitioners in their character as citizens of Kansas. The

court below did not ~~affirmatively~~ expressly decide that the sentences and commitments were not in contravention of the due process clause of the fourteenth amendment, but it is submitted that the decree denying the applications for writs of habeas corpus implicitly so rules.

In *Schlemmer v. Buffalo, R. & P. R. Co.*, (1905), 205 U. S. 1, 11, 51 L. ed. 681, 27 S. Ct. 407, in an opinion by Justice Holmes, it was said:

> "We certainly do not mean to qualify or lir the rule that, for a court to entertain jurisdicti of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not explicitly deciding the Federal matter. (Citing cases.) But, on the other hand, if the question is duly raised and the judgment necessarily, or by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it."

In *Gibbs v. Burke*, (1948), 337 U. S. 773, 93 L. ed. 1686, 69 S. Ct. 1247, petitioner in his petition for habeas corpus alleged that in the proceeding which resulted in his conviction he "was denied counsel and through ignorance of law and fact was forced to act as his own counsel" and "that he was denied his constitutional rights as set forth in the Ten Original Amendments, Article VI." This court said in its opinion, at p. 779:

> "Two procedural points require but brief attention. The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus. We consider insignificant under these circumstances the fact that petitioner cited the Sixth rather than the Fourteenth Amendment to the Con-

> stitution. Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

Petitioners concede that the applications for writs in the cases at bar may very well have been "inartistically" drawn due to the time available to counsel to prepare them. However, it is earnestly submitted that the Federal issues were raised therein, however inartistically stated, and were subsequently urged at every stage of the proceedings. It is also submitted that the Supreme Court of Kansas considered those issues, and implicitly decided that the conviction and confinement of petitioners was not in contravention of the "due process" clause of the fourteenth amendment.

Respondent quotes a statement out of context from petitioners' brief. It is stated at p. 21 of respondent's brief:

> "They (petitioners) admit, however, that the 'due process' was never mentioned."

The statement referred to appears at p. 24 of petitioners' brief, and an entirely different connotation is apparent when quoted fully:

> "It is true the term 'due process of law' was not employed in the *quoted portion* of petitioners' brief." (Italics added)

As previously indicated, petitioners have asserted from the outset that their convictions and sentences were contrary to "due process of law" (R. pp. 1 to 8 incl.).

Respondent apparently complains because petitioners did not rely on *Re William Oliver*, 333 U. S. 257, in the

proceeding below. It is true the *Oliver* case, supra, was specifically drawn to petitioners' attention in the brief amicus curiae filed by the Attorney General (and served on petitioners on the day of the hearing). By the same token, and in the oral argument as well, it is also true that the cited case was drawn to the supreme court's attention, and was as lightly considered by it as by petitioners.

Petitioners submit that in the light of the record and the references to the briefs of the parties filed below, which are not disputed by respondent, the federal questions, as presented in the petition for certiorari herein (p. 4) were adequately raised by the petitioners and implicitly decided adversely to them by the Supreme Court of Kansas. And, that therefore, there is no merit in respondent's contention that this Court is without jurisdiction.

II.

Respondent next argues that petitioners are not entitled to writs of habeas corpus because they failed to exhaust their state remedies, which included an appeal from conviction for contempt. The short answer to this contention is that petitioners attacked their convictions and restraint on the ground that they were unconstitutional and void which they were permitted to do under Kansas procedure.

The law of Kansas clearly gives petitioners the right to challenge their convictions for contempt by proceedings in habeas corpus inquiring into the legality of any judgment

whereby the party is in custody " . . . for any contempt of any court, office or body having authority to commit . . . " The Supreme Court of Kansas has repeatedly held that the quoted provision of the Kansas statute (G. S. 60-2213) does not apply in the case of persons held for contempt where the order committing such persons was made without jurisdiction. *In re Dill,* (1884), 32 Kan. 668, 5 Pac. 39; *In re Jewett,* (1904), 69 Kan. 830, 77 Pac. 567; *Wallace v. Weber,* (1931), 134 Kan. 201, 5 P. 2d 835.

The Supreme Court of Kansas, in the case at bar, had no doubt as to its jurisdiction to consider the issues raised by petitioners' applications for writs of habeas corpus. It said in its opinion (R. 179):

> " . . . These are original proceedings in this court. Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decisions on technicalities. We shall fully consider petitioners' contentions as now made . . . "

Respondent now contends that petitioners should have proceeded by appeal rather than by habeas corpus. He says the errors of which petitioners complain are "technical" and it is suggested that petitioners may not properly invoke the jurisdiction of this court until or unless they exhaust the remedy of direct appellate review afforded by the State of Kansas.

Petitioners submit that subsequent to the decision of the Supreme Court of Kansas in the original proceedings in habeas corpus, appellate review of their convic-

tions would have been futile, as the highest court of that state had announced that it had fully considered petitioners' contentions as then made. The identical issues before that court in the habeas corpus proceeding would have only been relitigated on appeal.

In *Brown v. Allen*, (1952), 344 U. S. 443, 97 L. ed 469, 73 S. Ct. 397, where convictions in capital cases were appealed to the court of last resort in the state, and petitions for certiorari to this court were denied, and subsequently petitions for writs of habeas corpus were filed in Federal district court and denied, and reached this court on certiorari, it was said in the opinion at p. 448:

> "It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court."

Counsel for petitioners appreciate the import of the far reaching issues discussed and determined in the cited case. They also appreciate that the short statement quoted above does not accurately reflect the importance of the opinions filed. However, it is urged that where the issues have been determined by the highest court of a given jurisdiction in original habeas corpus proceedings it would gain nothing to relitigate the identical issues by direct review of the proceedings in which the petitioners for habeas corpus have been deprived of their liberty. With all respect for the delicate relationships involved in a federal system of government, this would

not seem to be a case where empty procedural form should be required.

The suggestion by respondent that the Supreme Court of Kansas was without jurisdiction to consider the issues presented by petitioners is completely without merit. In any event, the question of the jurisdiction of that court is now res judicita, as it, in fact, assumed jurisdiction in the face of respondent's contention in the first paragraph of each of the answers filed in the original proceeding in habeas corpus below (R. 12, 41 and 82), that the Kansas court did not have jurisdiction.

The Supreme Court of Kansas has consistently liberally applied the remedy of habeas corpus, even in instances where direct appellate review might also have been available to a petitioner.

In *Whalen v. Cristell,* (1946), 161 Kan. 747, 173 P. 2d 252, in Syllabus No. 1, the court said:

> *"In habeas corpus proceedings the right of a petitioner to be released depends entirely upon the validity of his restraint on the date of the filing of his petition, and, notwithstanding statutory provisions restricting the issuance of the writ when it appears the petitioner's rights may be protected by appellate review, this court will (1) when in issue always inquire into and determine* questions pertaining to the validity and sufficiency of the commitment on its face to justify the restraint and *the jurisdiction of the court issuing the process . . . "* (Emphasis supplied)

In accordance with the rule announced above the Supreme Court of Kansas implicitly overruled the jurisdictional issue raised by respondent in his answer and

heard the matters on their merits and determined them adversely to the petitioners. Now, respondent contends that petitioners must seek direct appellate review of the identical issues in the same forum. Petitioners submit that their original applications for writs of habeas corpus were based, in part, upon the lack of jurisdiction of the committing judge to convict and sentence the petitioners in secrecy and without counsel, thus depriving them of their liberty without due process of law. Those grounds were certainly sufficient to warrant inquiry by the supreme court in the habeas corpus proceedings and constituted more than "technical errors" to be corrected by direct appellate review. There is no indication in the opinion of the Supreme Court of Kansas (R. 173-189 incl.) that its decision in the cases at bar rested upon the ground that habeas corpus was not the proper remedy. In fact, the opinion clearly states the contrary, where it is said:

> "We shall fully consider petitioners' contentions as now made." (175 Kan. 704, 708, R. 179)

The judgment of the Supreme Court of Kansas, with respect to the jurisdictional issue raised by respondent's traverse of petitioners' applications is now res judicata. *Woolsey v. Best*, 299 U. S. 1, 57 S. Ct. 2, 81 L. ed. 3; *Ex parte Spencer*, 228 U. S. 652, 33 S. Ct. 709, 57 L. ed 1010.

In *Brown v. Allen*, (1953), 344 U. S. 443, 486, supra, it was said, citing *Hawk v. Olson*, (1945), 326 U. S. 271 and *Herndon v. Lowry*, (1937), 301 U. S. 242:

> " . . . this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible."

In the *Hawk* case, supra, it was said at p. 278:

> "As the Supreme Court of Nebraska considered the motion for continuance on its merits, no question of state procedure for the reexamination of criminal convictions arises."

In *Herndon v. Lowry,* supra, it was said, at p. 247:

> "The scope of a habeas corpus proceeding in the circumstances disclosed is a state and not a federal question and since the state court treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here."

Petitioners submit that the rationale of *Brown v. Allen, Hawk v. Olson* and *Herndon v. Lowry,* supra, applied to the cases at bar must result in the conclusion that since the Supreme Court of Kansas treated the instant cases as properly before it in original habeas corpus proceedings and determined them on their merits, this Court may properly take jurisdiction on certiorari.

III.

Respondent states in his brief (p. 3) that the judicial proceedings which resulted in petitioners' convictions and sentences for contempt are "unhappily denominated an 'inquisition'." However unhappy the nomenclature might be, it remains substantially accurate. Respondent contends that the judge before whom the inquisition pro-

ceedings were conducted acted only in a judicial capacity. Petitioners submit that their characterization of the presiding official at those proceedings, as developed at pp. 18, 19 and 20 of their principal brief herein, presents that official in true perspective. The Court's attention is directed particularly to pp. 95, 96, 97, 98 of the Record of petitioner Parks' interrogation; pp. 101 and 102 of the Record with reference to the petitioner Ferris; and pp. 106, 107, 125, 127, 128, 135 and 136 of the Record in the case of Courtney.

The record plainly discloses an attitude on the part of the judge not ordinarily associated with an impartial arbiter, or consonant with the demeanor of a judge in open court. Respondent chooses to use the term *in facie curiae* rather than the term "open court" which petitioners have opted and which has been used by this Court in the leading cases of direct or criminal contempt which it has been called upon to review. *Savin, Petitioner*, 131 U. S. 267; *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257.

Petitioners submit that there is a substantial distinction in the meaning of the term used by respondent and that used by petitioners with reference to the power of a court to deal summarily with contempt. This is so particularly in the case of convictions and sentences *in camera* because of the possibility, even probability, of abuse of judicial power. There is nothing to restrain the judicial officer from wreaking full and instant vengeance for affronts to his authority, real or imagined. If the term "in the face of the court" means the same

as "open court", why, then, the concern of this Court, and the authorities from Bentham to Wigmore, with the need and desirability of public hearings in criminal prosecutions for contempt, as well as other offenses?

Respondent contends that it is impossible to discern any benefit to petitioners arising from public observance of punishment for their conduct, where no evidence is required nor defense permitted. The answer to the contention is, of course, inherent in the decisions of this Court where it has insisted that trials for contempt, even where committed in *facie curiae*, be held in open court. *Re William Oliver*, 333 U. S. 257, 275; *Cooke v. United States*, 267 U. S. 517, 534. In the *Cooke* case, supra it was properly said:

> "We think the distinction finds its reason, not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the very 'hallowed place of justice,' as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow . . .
>
> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument."

Conceding, arguendo, that petitioners were guilty of contempt in *facie curiae*, as respondent puts it: Does respondent contend there was a necessity to deprive the

petitioners of advice of counsel before proceeding to convict and sentence them summarily *in camera?* Was the dignity of the "court" better vindicated in the eyes of the public by its swift exercise of authority when the public was not even aware that petitioners were being interrogated, let alone that they were guilty of disobedience of an order of the court? Petitioners submit it was not, unless terror of judicial authority by the public be the desideratum.

Respondent cites *Sacher v. United States,* (1953), 343 U. S. 1, 72 S. Ct. 451, 96 L. ed. 717, as authority for his statement to the effect that this Court has rejected petitioners' contention that summary punishment for contempt may only be exercised to forestall demoralization of a court's authority before an attending public. (Respondent's Brief p. 32)

Petitioners submit that a careful consideration of the *Sacher* case discloses no rejection of their contention as stated by respondent. Rather, the majority opinion of this Court refers to the conduct of the contemnor as interfering with "the expeditious, orderly and dispassionate conduct of the trial" (p. 5); and implies that behavior such as charged against *Sacher* is contrary to "The interests of society in the preservation of courtroom control by judges . . . " (p. 8). The opinion states, at p. 9:

> "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise."

Of course, the facts of *Sacher* are easily distinguished from those of the case at bar. In the cited case the contemnors had engaged in a bitterly contested trial in *open court* for a period in excess of six months. The contemnors, with one exception, were members of the bar, and their conduct of the case, as indicated by its stormy history,[1] was certainly deserving of censure, if not summary punishment.

This Court, in its majority opinion in the *Sacher* case, said, at p. 10:

> " . . . but we have held that a contempt judgment must be public . . . "[2]

Petitioners submit that the *Sacher* case, relied upon by respondent, does not support his argument that a judge may summarily punish for contempt *in facie curiae in camera.*

It is submitted that the better rule is that the judicial authority to summarily punish contempt should be limited to the power adequate to preserve order and decorum and to compel obedience to valid court orders; and should never be exercised without benefit of the constitutional safeguards of due process of law, except in instances where the court must act to preserve order and decorum in the courtroom.

The rule above stated has its foundation in the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper*

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1. **United States v. Sacher,** (2d Cir.) 182 F. 2d 416; **United States v. Dennis,** (2d Cir.), 183 F. 2d 201; **Dennis v. United States,** 341 U. S. 494, 71 S. Ct. 857, 95 L. ed. 1137.

2. **In re Oliver,** 333 U. S. 257, 68 S. Ct. 499, 92 L. ed. 682.

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Co. v. United States, (1918), 247 U. S. 402, 425-426, 38 S. Ct. 560, 62 L. ed. 1186, wherein it was said:

> "I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

The dissent of Justice Holmes has been substantially followed by the majority of this Court in the later cases of *Cooke v. United States*, 267 U. S. 517, and *Re William Oliver*, 333 U. S. 257.

Respondent relies on a line of cases which begins and ends in the nineteenth century. The cases he relies upon have been repeatedly limited and narrowed; and, despite their venerability, not one case supports the proposition for which he contends: that is, the validity of convictions and sentences for contempt rendered in secret, and in deprivation of counsel. A possible exception to the above is *Ex parte Nugent*, (C. C. D. C.), Fed. Cas. No. 10,375, 1 Hayw. & H. C. C., 1 Brunner's Coll. Cases 296, which in 1848 affirmed a judgment of the United States Senate of conviction for contempt. The contempt and conviction both occurred, apparently, at a secret session of the Senate.

The latest reported case involving contempts and their summary punishment is *Offut v. United States*,.. U. S. .., 75 S. Ct. 11, decided November 8, 1954, in which the conviction and sentence of an attorney for contempt was reversed. The case is not in point with the instant

case as the alleged contemptuous conduct and the conviction therefor took place in open court, and involved 42 (a) of the Federal Rules of Criminal Procedure. However, with reference to the power of courts to punish contempts summarily, this Court used the following language, at p. 13 of the Advance Sheet:

> "It is a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage."

Petitioners submit that their conduct in refusing to answer the questions propounded by their inquisitors did not "outrage" or obstruct the majesty of the law in such a manner as to justify their summary convictions and sentences in secret and without counsel; and, that the law under which they were summarily sentenced and convicted would have been served as well had they been permitted to confer with counsel and to have a trial, or at least a hearing, of their contentions which they advanced in support of their refusal to answer.

CONCLUSION.

The Federal issues raised by petitioners in their pleadings, evidence, briefs and oral argument in the Supreme Court of Kansas were: (1) May witnesses at an inquisition proceeding be accused, tried, convicted and sentenced to imprisonment for contempt of court in secret?; and (2), Does the failure to allow such witnesses an opportunity to confer with counsel of their choice when accused of contempt in a secret proceeding, or to afford a hearing or an opportunity to defend themselves prior

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to conviction and sentence for contempt, constitute a denial of due process of law?

The decision of the Supreme Court of Kansas denying the petitioners writs of habeas corpus necessarily and implicitly determined that the denial of counsel to petitioners, the failure to afford them an opportunity to be heard or defend before conviction, and the denial of a public trial of the alleged contemptuous conduct did not constitute a denial of due process of law as contemplated by the Fourteenth Amendment to the Constitution; and, therefore, this Court may assume jurisdiction.

There is no merit to respondent's contention that petitioners did not exhaust their state remedies before petitioning this Court for certiorari, by not seeking direct appellate review of their convictions and sentences for direct contempt of court. The Supreme Court of Kansas heard petitioners' applications for writs of habeas corpus on the merits and fully considered their contentions and determined them adversely to petitioners. Petitioners may properly petition this Court for review of that determination since the state of Kansas treated habeas corpus as permissible.

The rule for which petitioners contend is that the judicial authority to punish contempts is limited to the power adequate to preserve order and decorum in open court, and to compel obedience to valid orders of the court. Summary power should not be exercised without the traditional safeguards to life and liberty afforded by the due process of law contemplated in the Fifth and Fourteenth Amendments to the Constitution,

except in instances where it is necessary to act to preserve order and decorum in open court.

For these reasons the decree of the Supreme Court of Kansas should be reversed and remanded to that court with instructions to dispose of the petitioners' applications for writs of habeas corpus consonant with the Fourteenth Amendment to the Constitution.

Respectfully submitted,

PAYNE H. RATNER,

KEITH EALES,
444 North Market,
Wichita, Kansas,
Attorneys for Petitioners.

LOUISE MATTOX,
PAYNE H. RATNER, JR.,
RUSSELL CRANMER,
DALE B. STINSON, JR.,
CARROLL F. POPE,
CLIFF W. RATNER,
WILLIAM L. FRY,
A. WAYNE MURPHY,
Wichita, Kansas,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 179.

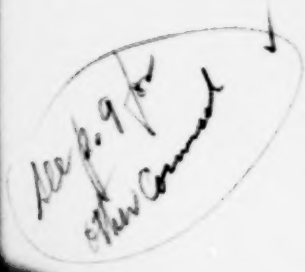
CECIL L. COURTNEY, PHILIP T. FERRIS AND RAY PARKS, PETITIONERS,

VS.

TY LOCKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR RESPONDENT IN OPPOSITION.



HAROLD R. FATZER,
Attorney General, State of Kansas,
Capitol Building,
Topeka, Kansas,
Counsel for Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

Petitioners were subpoenaed to testify as witnesses at a statutory investigatory proceeding conducted by the County Attorney of Sedgwick County, Kansas, under the supervision of a judge of the District Court of Sedgwick County (R. 13-14, 42-43, 84-85). The proceeding is designed to perform functions of the traditional grand jury, and it was conducted as is customary, with the public excluded.

Although they had been fully advised by the court of their constitutional rights and had been granted complete immunity from prosecution for crimes related to any of their testimony, petitioners refused to comply with orders of the court requiring them to answer certain questions (R. 38-40, 50, 80-81, 95-96, 98). Thereupon they were summarily adjudged guilty of contempt of court (R. 40, 80-81, 98).

Petitioners applied to the Supreme Court of Kansas for writs of habeas corpus (R. 1-3, 3-6, 6-9). In their applications petitioners challenged the validity of their commitments on the sole grounds that:

> 1. The district judge exceeded his statutory authority by conducting the inquisition in secret;
>
> 2. Petitioners' rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Section Ten of the Kansas Bill of Rights had been violated because petitioners were compelled to give self-incriminating testimony (R. 2, 4-5, 7-8).

The following additional question was passed upon by the Supreme Court of Kansas, although the Court indicated that it had not been properly raised by petitioners:

> 3. When a witness disregards an order of the Court in the immediate presence of the Court and within the personal view of the judge, does the Kansas or Federal Constitution require that the offenders be presented with formal charges and have the assistance of counsel prior to punishment for contempt of court? (R. 185-187.)

All three of the questions were resolved adversely to petitioners by the Supreme Court of Kansas (R. 173-192). Petitioners' applications for writs of habeas corpus were denied, as were their motions for rehearing (R. 189, 196).

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A reiteration of the questions passed upon below is made necessary by petitioners' attempt, in the instant proceeding, to avoid those questions and to substitute entirely different issues for determination by this Court.

Petitioners now contend that the secrecy of the inquisition proceeding, including their commitments for contempt, violated their rights under the Federal Constitution (Petition, p. 4). They rely on the case of *Re William Oliver*, 333 U. S. 257, to support their contention (Petition, p. 4). But before the Supreme Court of Kansas, petitioners' sole objection to the secrecy of the entire proceeding was based upon petitioners' construction of the inquisiton statute (R. 2, 4-5, 7-8). The Oliver case was never cited by petitioners in the four briefs which they filed below, including their brief in support of a motion for rehearing; and the Oliver case was never considered by the Court below (R. 172-193). The secrecy question, as a constitutional problem, made its first appearance in this proceeding when the petition for writ of certiorari was filed by petitioners.

ARGUMENT.

I. The Issues Raised by Petitioners in the Instant Proceeding Were Neither Presented to, nor Passed upon, by the Supreme Court of Kansas.

Petitioners invoke the jurisdiction of this Court under Section 1257 of Title 28 of the United States Code on the ground that, in the proceedings below, there were specially set up and claimed under the Constitution of the United States rights, privileges and immunities of the petitioners (Petition, p. 3). Respondent objects to the jurisdiction of this Court to entertain the issues raised by petitioners concerning the secrecy of the investigatory proceedings which gave rise to petitioners' commitments for contempt of court in that:

a. The objection to the secrecy of the proceedings, contained in both questions presented by petitioners for determination in the instant proceeding (Petition, p. 4), was neither presented to, nor decided by, the Supreme Court of Kansas.

b. No federal rights, privileges or immunities of petitioners, related to this question, were specially set up and claimed, or passed upon, in the proceedings below.

Petitioners' failure in this respect is jurisdictional. Ch. 646, 62 Stat. 929, 28 U. S. C. 1257.

The only objection to the secrecy of the inquisition proceedings, raised before the Supreme Court of Kansas, was grounded on petitioners' contention that the inquisition statute, according to petitioners' construction, did not authorize a secret proceeding. In substantially identical applications to the Kansas Supreme Court for writs of *habeas corpus* the three petitioners challenged the secrecy of the inquisition as follows:

> "II. Your petitioner further shows this Court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret * * *" (R. 2, 4-5, 7-8).

The Supreme Court of Kansas prefaced its discussion of the secrecy question with the following statement of the issue as presented to the Court:

> "Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended the inquisition should be held in secret * * *" (R. 183).

This Court has no concern with, or jurisdiction to review, the construction placed upon a Kansas statute by a

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Kansas court, absent a challenge to that court that a proposed construction of the statute conflicts with some provision of the Federal Constitution. *Erie Railroad* v. *Tompkins*, 304 U. S. 64; *Edelman* v. *California*, 344 U. S. 357, 358-9.

Petitioners assert now, for the first time, that the decision of the Kansas Supreme Court is in conflict with the decision of this Court in *Re William Oliver*, 333 U. S. 257 (Petition, p. 4). This Court will search in vain for a reference to the Oliver case in either the majority or dissenting opinions of the Kansas Supreme Court (R. 173-192).

Of conclusive significance is the discussion by the Kansas Supreme Court of the Sixth Amendment to the Constitution of the United States and Section Ten of the Kansas Bill of Rights.[1] Both provisions deal, in part, with

---

[1]In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor,* and to have the Assistance of Counsel for his defense. Sixth Amendment to the Constitution of the United States.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; *to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.* No person shall be a witness against himself, or be twice put in jeopardy for the same offense. Section Ten of the Kansas Bill of Rights.

The italicized portion of each provision was excluded in quotation by the Kansas Supreme Court (R. 181).

the right of an accused to a *public* trial (Our italics). The language dealing with the "public trials" was eliminated from the provisions, as quoted by the Court, obviously because it was not material to any issues raised by the petitioners (R. 181). If the Kansas Supreme Court had actually been confronted with the issue of whether or not the secrecy of the inquisition proceeding violated petitioners' rights under either provision, it is inconceivable that no reference would have been made to the language pertaining to a public trial. Instead, the provisions were examined solely in the light of petitioners' contention that their inability to obtain counsel deprived them of constitutional rights. The Court set forth in its opinion the language of each provision "insofar as material" (R. 181).

Apart from the question of statutory construction, issues were raised below concerning petitioners' summary commitments and lack of counsel. But these issues, and the claim now abandoned by petitioners that they were compelled to give self-incriminating testimony, were the only questions presented to the Supreme Court of Kansas as effecting petitioners' rights under the Federal Constitution (R. 2, 4-5, 7-8, 173-192). The generality with which the petitioners now frame the questions they allege were presented in their applications for *habeas corpus* (Petition, p. 2), cannot transform a question, confined, below to the proper interpretation of a Kansas statute, into a constitutional issue reviewable by this Court. *Cincinnati, N. O. & T. P. R. Co.* v. *Slade*, 216 U. S. 78, 83; *Beauharnais* v. *Illinois*, 343 U. S. 250, 264-5, rehearing denied 343 U. S. 988.

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II. No Important Question of Federal Law Is Presented by This Petition for Writ of Certiorari, and the Decision Below Is Consistent with Decisions of This Court.

Petitioners' objections to their summary commitments and to deprivation of counsel during the inquisition were not raised below in conjunction with the charge, now asserted, that the secrecy of the proceeding entitled petitioners to counsel and presentment with formal charges under the Federal Constitution (R. 2, 4-5, 7-8). The Supreme Court of Kansas decided only the narrower question of any person's right to presentment with formal charges and to the assistance of counsel at a summary proceeding for the punishment of a direct contempt of court (R. 182-3, 185). The resolution of these issues by the Kansas Court presents no important question of federal law, nor does it conflict with any decision of this Court.

Refusal of a witness to testify at an inquisition proceeding is properly punishable as a contempt of court. *Jack* v. *Kansas*, 199 U. S. 372. Petitioners declined to answer questions propounded by the County Attorney and his assistants, although they had been granted full immunity from prosecution for any crimes connected with their testimony (R. 38-40, 50, 80-81, 95-96, 98). They still refused to testify when so ordered by the judge of the District Court presiding at the inquisition proceeding (R. 38-40, 50, 80-81, 95-96, 98). In response to the Court's order, petitioner Courtney replied:

> "I am aware of that fact your Honor but I am not going to rat on anybody that I know anything on, if I knew anything I wouldn't tell it, I don't know anything and I ain't going to tell it" (R. 80).

Complete disregard for the Court's order was exhibited in the immediate presence of the Court and within the personal view of the judge by all three petitioners (R. 39-40, 80-81, 98).

> " 'Where the contempt is committed directly under the eye or within the view of the court, it may proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form.' * * *" *Savin, Petitioner,* 131 U. S. 267, 277.
>
> "There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense." *Cooke* v. *United States,* 267 U. S. 517, 534.

Had petitioners set up or claimed below or had the Kansas Court decided, adversely to petitioners, the necessary constitutional objection to secrecy, still no important or substantial federal question would be before this Court. The Oliver case, upon which petitioners principally rely, involved a summary trial for perjury, denominated a form of contempt. It involved a necessary weighing of evidence, and a determination of conflicting facts inherent in trials. There was nothing to try in the cases at bar. Petitioners' admitted refusal to answer in the presence of the Court, unsupported by any other fact or circumstance, compelled summary adjudication.

CONCLUSION.

Before the Supreme Court of Kansas petitioners primarily rested their case on an interpretation of a Kansas statute. Having failed in this respect petitioners now seek, for the first time, an adjudication that the interpretation given the statute violated constitutional provisions. Juris-

dictional limitations and due respect for the Court below prohibit this belated attempt.

The decision below involved no important question of federal law and is in full accord with decisions of this Court.

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD R. FATZER,
Attorney General, State of Kansas,
Capitol Building,
Topeka, Kansas,

WARNER MOORE,
County Attorney, Sedgwick County, Kansas,

CHARLES D. ANDERSON,
Deputy County Attorney, Sedgwick County, Kansas,

PAUL R. KITCH,
DONALD R. NEWKIRK,
DALE M. STUCKY,
Special Deputy County Attorneys,
Sedgwick County, Kansas,

By _____,
Attorneys for Respondent.

Date _____.

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HAROLD B. WILLEY,

BRIEF FOR RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 179.

CECIL L. COURTNEY, PHILIP T. FERRIS AND RAY PARKS, PETITIONERS,

VS.

TY LOCKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

HAROLD R. FATZER,
Attorney General, State of Kansas,
Capitol Building,
Topeka, Kansas,

WARNER MOORE,
CHARLES D. ANDERSON,
PAUL R. KITCH,
DALE M. STUCKY,
DONALD R. NEWKIRK,
Wichita, Kansas,

Attorneys for Respondent.

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IN THE

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OCTOBER TERM, 1954.

No. 179.

CECIL L. COURTNEY, PHILIP T. FERRIS AND RAY PARKS, PETITIONERS,

VS.

TY LOCKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The majority (R. 173-189) and dissenting (R. 189-192) opinions in the Supreme Court of Kansas are reported as *In re Ferris*, 175 Kan. 704, 267 P. 2d 190.

JURISDICTION.

The judgment of the Kansas Court was entered March 3, 1954 (R. 175), rehearing denied April 14, 1954 (R. 196). The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code (62 Stat. 929).

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioners rely on Section One of the Fourteenth Amendment to the Constitution of the United States, set forth in the appendix to Petitioners' Brief (p. 47).

Statutes involved are General Statutes of Kansas, Sections 62-301, 20-1203, 20-1205 and 60-2213, all of which are set forth in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW.

A. Does this court have jurisdiction to review a judgment of the Supreme Court of Kansas denying writs of habeas corpus where the Federal Constitutional questions presented to this Court were not presented in the applications for writ of habeas corpus, were not raised in oral argument or briefs, in motion for rehearing or otherwise called to the attention of, or decided by, the Kansas Court?

B. Does this Court have jurisdiction to review such a judgment when the questions, if they had been presented below, would not have been within the jurisdiction of the state court to determine in a habeas corpus proceedings and when petitioners have failed to exhaust adequate state remedies by review proceedings of the contempt judgments of which they now complain?

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C. Were petitioners deprived of rights guaranteed to them by the due process clause of the Fourteenth Amendment to the Constitution, when they were punished for direct contempt *in facie curiae* for failure to answer questions in an investigatory proceeding, simply because the doors of the courtroom were not opened to the public after the contempt and prior to their sentencing?

STATEMENT.

Petitioners were held in direct contempt of court for refusal to answer questions as witnesses in judicial proceedings under a Kansas Statute (G. S. Kan. 1949, 62-301, Appendix) providing for the investigation of offenses against the state.

The statute provides that such judicial proceedings, unhappily denominated an "inquisition," be initiated by the county attorney. In order to institute such proceedings, he is required to file with the court a written statement alleging offenses against the laws of the state. On the written praecipe of the county attorney, the judge issues subpoenas requiring witnesses to appear and testify concerning the offenses. The testimony must be reduced to writing.

No person is excused from testifying on the ground that his testimony may incriminate him; but he is given complete immunity from prosecution coextensive with his constitutional privilege against self-incrimination.[1] *In re Ferris*, 175 Kan. 704, 711, 267 P. 2d 190.

The presiding judge is empowered to fine and imprison a witness for contempt on account of his refusal to answer questions touching the matter.

---

[1]A question raised below, decided adversely to petitioners, and abandoned here.

The investigation is initiated and conducted by the county attorney. It is carried on, however, in the court's presence and under his judicial supervision. The statute gives the court no investigative function or duties.

The county attorney is responsible for the institution and prosecution of subsequent criminal proceedings if the testimony at the investigation reveals that an offense has been committed.

On January 7, 1954, the county attorney of Sedgwick County filed with the clerk of the District Court of that county a statement and request for such an "inquisition" (R. 28-29).

The statement alleged that unknown individuals had been guilty of assault and battery and of causing damage to and the destruction of property by the use of bombs in connection with a certain labor dispute. The prayer was that an inquisition be held to inquire into the facts of such offenses (R. 28-29).

The cause was docketed by the clerk as any other judicial cause and given a case number. It was regularly assigned to Division No. 1 of the court and transferred to Division No. 2 for the reason that Division No. 1 was occupied in the trial of cases (R. 29-30).

The county attorney filed praecipes requesting petitioners to appear. The court issued subpoenas and the petitioners were called and appeared as witnesses (R. 35-36, 46-47, 88-89).

A full and complete record was made by the official court reporters of all proceedings, and all relevant portions thereof are contained in the printed record in this court. Proceedings were conducted with the public excluded (R. 14-15, 37-40, 49-82, 85, 92-98).

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Petitioner Ferris was the first of the three to appear (R. 37).

An assistant county attorney questioned him as to his age, name, and address and then advised him as to the purpose of the investigation (R. 37). He then was asked whether he was willing to give the county attorney's office aid and assistance in finding out who it was that was responsible for the various acts of violence (R. 37). The witness replied:

> "A. I refuse to answer any question; it would be in violation of the 14th Amendment. I have no legal counsel and it is a violation under Kansas Law.
>
> * * * * * * *
>
> "Q. You understand the Court will instruct you upon your constitutional right to object?
>
> "A. I also understand anything I might say I might be prosecuted for under Federal Law, if not State Law.
>
> "Q. You understand if you refuse to answer these questions the Court will have no alternative but to handle the matter as a contempt case?
>
> "A. I refuse to answer them because I have no legal counsel" (R. 37-38).

The witness nevertheless answered a number of questions regarding his citizenship and prior activities (R. 38).

The court interrupted the questioning to explain to the witness his rights, as follows (R. 38-39):

> "The Court: At this point I would like to interrupt. Mr. Ferris, any questions that are asked of you and the answers you feel might tend to incriminate you with reference to any of the violations of our State Criminal Law, you have the right to object to answer them. But, if the Court orders you to answer them it will be necessary for you to answer the questions, and

you will be immune from prosecution on any testimony that you give in here about any transactions to which you are compelled to testify to. Also, the testimony in here in this inquisition cannot be used against you. Do you understand what I mean?

"Mr. Ferris: I understand sir (R. 38-39).

"The Court: * * * However, that does not go to the extent that if you testify in here and testify falsely that you will not [sic] be immune to prosecution for perjury. Do you understand that?

"Mr. Ferris: I understand (R. 39).

* * * * * * *

"The Court: Do you have any questions to ask of the Court?

"Mr. Ferris: No.

"The Court: Proceed.

"By Mr. Kitch Continuing:

"Q. Now, back to the question of whether you are willing to give this investigative body any aid or assistance in identifying those persons who are responsible for acts of violence in which you have no connection yourself. Now, are you willing to help us?

"A. I refuse to help you.

"Q. Just a minute. Are you willing to help us to apprehend those people who have violated our laws in the instances where you yourself have in no way been involved?

"A. I refuse to testify to anything. The whole procedure is illegal in the Kansas Law.

"Q. Do you know Cecil Courtney?

"A. I refuse to testify or to answer questions.

"The Court: Mr. Ferris, as I understand your position, that you refuse to testify in here as to any acts of violence that you may have some knowledge of, even though you are not incriminated in those acts of violence, is that correct?

"Mr. Ferris: I refuse to answer" (R. 39).

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The court again explained the purpose of the inquisition to the witness, whereupon Ferris stated "I believe the hearing is illegal. That is all I believe about it" (R. 40). Thereupon the court stated:

> "The Court: Well, the Court will find you guilty of Contempt at this time. Upon your refusal to answer questions asked in this Inquisition the Court is going to find you guilty of Contempt and is going to sentence you to the County Jail for one year * * *" (R. 40).

Shortly after Ferris was in contempt, petitioner Cecil L. Courtney was called as a witness (R. 49).

After a few preliminary questions and answers, the county attorney explained the purpose of the investigation, that it was confined to violence and that it was not concerned with the taxicab strike around which the violence centered. The witness stated he would cooperate the best he could (R. 49-50).

Thereupon, the court advised the witness as to his rights, substantially as he had Mr. Ferris (R. 50-51). The witness had no further questions as to his rights:

> "The Court: Do you have any questions?
> "A. I believe not" (R. 51).

The examination continued. The witness testified that he had theretofore been found in contempt of court in connection with violating an injunction by throwing a paint bomb (R. 54-55). Upon being asked what the alleged bomb consisted of, the witness objected to answering (R. 55). The court did not require him to answer (R. 55). The examination again proceeded (R. 55-60). The witness objected to a question relating to a cache of bomb fluid and he was not required to answer (R. 60). Other questions were objected to with respect which the witness was not required

by the court to answer (R. 60, 66). The witness was required to and did answer certain other questions to which he objected (R. 69, 70). Thus, he testified over his objection that he and petitioner Ferris dug up a jar of "stink bomb" fluid at the cache on at least three occasions (R. 73). At the witness' request, he was given a "running objection" to the entire line of questioning (R. 73-74). The witness described how he and petitioner Ferris had mixed the fluid (R. 75-78). He testified that early in January he brought the fluid to strike headquarters (R. 79). The following took place:

> "Q. Who did you give it to when you took it down to strike headquarters?
>
> "A. I object.
>
> "The Court: You will be required to answer.
>
> "A. I object.
>
> "The Court: You are required to answer Mr. Courtney. The question is, who did you give it to down at strike headquarters, who did you turn it over to?
>
> "A. I object.
>
> "The Court: You refuse to answer?
>
> "A. Yes, sir.
>
> "The Court: You refuse to answer. The only alternative the court has is to punish you for contempt and the court doesn't want to do that to you, Mr. Courtney.
>
> "A. I am aware of that fact your Honor but I am not going to rat on anybody that I know anything on, if I knew anything I wouldn't tell it, I don't know anything and I ain't going to tell it.
>
> "The Court: You are going to refuse to answer this last question as to who you gave it to down at strike headquarters?
>
> "A. Yes, sir.
>
> "The Court: You know what you are making the court do?

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"A. I am aware of that fact your Honor" (R. 80-81).

The court then held the witness in contempt and sentenced him to 90 days in jail (R. 81).

Two days later, petitioner Parks appeared as a witness (R. 92). Upon being asked where he lived, the witness replied as follows:

> "A. Well, I received this letter that was sent to Mr. Sam Smith and it was sent to me particularly on advice of local attorneys, Ratner, McClellan, Mattox and Ratner, which says it is the legal aspect and that said inquisition is entirely legal but in our opinion some of the phases of the manner in which it is being conducted are illegal and unconstitutional, and it gives four points of law as to why it is illegal. I am basing my refusal to testify on those four points of law here.
>
> "Q. You mean you are going to refuse to testify here before we even get a chance to ask you any questions, is that it?
>
> "A. Yes, sir, I do, because it is illegal" (R. 92).

The letter (R. 90-91) was marked as an exhibit and placed into the record (R. 97). It was written by counsel now representing petitioners, addressed to the business representative of the union (R. 90). In material parts, it is as follows:

> "You have requested our advice as to the legal rights of members of your Union to testify or to refuse to testify at the inquisition * * *
>
> * * * * * * *
>
> "Therefore, if you or any of your members decide, for any reasons of your own, that you or they desire to refuse to testify you should base such refusal on the following grounds:

"1. This inquisition is so conducted that it is illegal and unconstitutional in that, (a) it is being conducted by attorneys not authorized by law. (b) that members of the police department and the sheriff's office are present. (c) that it is otherwise secret. (d) that you are not permitted any legal counsel.

"2. That this inquisition infringes upon your right of free speech.

"3. This inquisition forces you to give evidence which might tend to incriminate you under Federal laws or the laws of other states.

"4. That this inquisition does not afford you equal protection of the law or due process of law" (R. 90-91).

The court fully instructed the witness as to his rights, substantially as he had the other two petitioners (R. 95-96), and then stated:

"Q. Now then I want you to understand what your rights are before we proceed because you are going to be asked some questions, and I want you to understand fully and exactly what your rights are. Do you understand them now?

"A. Yes, sir.

"Q. Mr. Kitch, you may proceed (R. 96).

Examination by Mr. Kitch.

"Q. After the Court advised you about these matters you are going to refuse to answer any questions whether it is incriminating you or not, or has a tendency to?

"A. I refuse to answer any questions whatsoever.

"The Court: Let me say something here. Your refusal to testify is punishable by the court for and as contempt of court?

"A. I realize that, sir.

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"The Court: The Court does not want to have to put you in jail for contempt. I don't think you want to go over there for contempt.

"The Court: But if you refuse to testify the Court has no other alternative. I don't think they need you over in jail to make a test case, we have two of them over there now and that ought to be sufficient to test it. Do you want to take a little recess and think it over?

"A. No, sir. I have thought it over and I still refuse to testify on the basis of that letter" (R. 97).

He stated that he refused to answer any questions whether they tended to incriminate him or otherwise on the grounds that were in the letter (R. 98). "I think it is illegal and unconstitutional" (R. 98). The following then occurred:

"The Court: Ray, you are forcing the Court to do something the Court does not want to do, but you do absolutely refuse to answer any and all questions, is that right?

"A. Yes, sir.

"The Court: The Court finds you in contempt of this Court for your refusal to answer questions and it is the sentence of this Court that you be taken from this court room to the Sedgwick County jail and there be held for a period of one year for contempt of this court" (R. 98).

Journal entries were filed of record in each instance specifying the refusal to answer questions as being contempt, briefly specifying the reasons given for such refusal, and setting forth the sentence (R. 36, 48, 89-90).

Each petitioner filed within two days an application for writ of habeas corpus in the Supreme Court of Kansas and was immediately released under bond (R. 1-11). Respondent sheriff filed answer showing cause of restraint,

attaching copies of the record judgments and complete copies of relevant proceedings (R. 12-98).

No appeal was taken by petitioners to review the contempt judgment. No request of any kind for relief was made or has been made to the district court.

The grounds set forth in the application for writs of habeas corpus are identical, as follows:

> "II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.
>
> "III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas" (R. 2, 4-5, 7-8).

SUMMARY OF ARGUMENT.

I. The questions presented by petitioners (Pet. 4) both rely on an argument that the character of the investigatory proceedings changed after petitioners refused to answer questions and became, at that point, a trial for contempt, requiring, under the due process clause, that the doors of the court room be thrown open to the public and that petitioners be given the right to counsel and trial.

The applications to the Kansas Court for writs of habeas corpus put in issue no such questions (R. 1-3, 3-5, 6-8). The question of secrecy was raised only as an issue of statutory construction and no issue was raised with regard thereto under the Federal constitution. The only Federal constitutional question raised in the applications for writs of habeas corpus had to do with the privilege against self-incrimination, a question now abandoned by petitioners. No issue of any kind was raised respecting the "changed character" of the proceeding.

The petitioners failed to brief or argue the questions sought to be raised here to the Kansas court, or to raise them in their applications for rehearing. The Kansas court considered questions not contained in petitioners' applications for writs of habeas corpus, but it did not consider the new questions now urged (R. 173-192).

Under the circumstances, the Court has no jurisdiction to entertain these petitions for writ of certiorari or to grant the relief sought. *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646; *Wilson* v. *Cook*, 327 U. S. 474.

II. Habeas corpus proceedings in Kansas raise jurisdictional questions only. G. S. Kansas 1949, 60-2213 (App.); *In re Gambrell*, 160 Kan. 620, 164 P. 2d 122; *In re Hanson*, 129 Kan. 597, 283 Pac. 659.

Kansas provides a complete and adequate remedy in the Kansas Supreme Court by proceedings in review of direct contempt judgments. G. S. Kansas 1949, 20-1205 (App.); *Bird* v. *Gilbert*, 40 Kan. 469, 19 Pac. 924; *Wallace* v. *Weber*, 134 Kan. 201, 5 P. 2d 855.

Petitioners failed to avail themselves of this remedy and the questions raised here, had they been presented below, would have been without the jurisdiction of the Kansas Court. *In re Hanson*, 129 Kan. 597, 283 Pac. 659. Consequently, this Court has no jurisdiction to determine the questions with respect which petitioners have not exhausted state remedies. *Woods* v. *Nierstheimer*, 328 U. S. 211; *Edelman* v. *California*, 344 U. S. 357.

III. The court which held petitioners in contempt was at the time acting in a judicial, as distinguished from an investigatory, capacity. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447. It had no investigatory powers or functions. *The State* v. *Jack*, 69 Kan. 387, 76 Pac. 911; *In re Ferris*, 175 Kan. 704, 267 P. 2d 190 (R. 173-192). Its sole rule during the investigation was that of advising petitioners of their rights and of protecting such rights, which it did.

The contempts were committed *in facie curiae*, within the court's own hearing and view, and nothing except what the court saw and heard regarding petitioners' own actions was necessary to a determination of contempt. *Ex parte Terry*, 128 U. S. 289; *Fisher* v. *Pace*, 336 U. S. 155; *Sacher* v. *United States*, 343 U. S. 1. The contemptuous conduct was a willful disobedience to an order of the court specially designed to obstruct the administration of justice.

Under the Kansas statute, requiring the presence of a judicial officer at an investigation, such conduct becomes direct contempt *in facie curiae* subject to summary punish-

ment and the fact that the public continued to be excluded from the court room at the time of sentence does not alter the need for the summary contempt power or the propriety of its use. *Ex parte Terry*, 128 U. S. 289; *Sacher* v. *United States*, 343 U. S. 1; *Eilenbecker* v. *District Court*, 134 U. S. 31; *Myers* v. *United States*, 264 U. S. 95.

ARGUMENT.

I. This Court Is Without Jurisdiction Since the Questions Presented Were Not Raised Below or Called to the Attention of or Decided by the State Court.

This court is without jurisdiction to review the judgment of the Supreme Court of Kansas for the reason that petitioners rely solely on a Federal constitutional question which was not raised below or called to the attention of, or decided by, the state court. *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Howard* v. *Fleming*, 191 U. S. 126; *Wilson* v. *Cook*, 327 U. S. 474. This case is governed by the rule stated in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434-435, as follows:

> "* * * In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

> It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. * * *
>
> "* * * In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. * * *"

Both questions sought to be raised here (Petition for Writ of Certiorari, 4) relate solely to violations of federal due process requirements resulting from the secrecy in which petitioners were held in contempt and sentenced. These questions were not raised in the applications for writs of habeas corpus with which the Kansas court was concerned.

Paragraph numbered I of the applications for writ of habeas corpus are simply recitations of petitioners' arrest, interrogation and sentencing, and do not attempt to set forth any grounds for relief (R. 2, 4, 7).

Paragraph numbered II of the applications raised a question having to do with the authority conferred upon the court by the Kansas statute. The question related solely to the construction of the state statute (R. 2, 4-5, 7-8).

Paragraph numbered III of the applications relied solely upon deprivation of constitutional rights in requiring petitioners to testify to matters that would tend to incriminate them[1] (R. 2, 5, 8).

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[1]Petitioner Parks also contended (R. 8) that he requested counsel as a witness, but did not urge this on due process grounds or in connection with the present contention regarding secrecy of the contempt proceeding.

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Each of these grounds related solely to questions regarding the regularity and validity of the investigation itself, as distinguished from the validity and regularity of the court's sentence for contempt.

No question was raised as to whether the district court erred in pronouncing sentences *in camera*, or whether it had jurisdiction to do so. Secrecy was mentioned only in connection with the jurisdiction of the court under the statute to hold the investigation *in camera* (R. 1-9).

Secrecy was never mentioned below in connection with any constitutional question, state or federal.

Every question raised and every argument made in this court is based on the "contention of petitioners that the character of the proceedings had changed from an inquisition to a criminal prosecution upon their refusal to answer, and that at that time they were entitled to the procedural standards required in prosecutions for contempt" (Petitioners' brief, 24-25). The petitioners state that this contention regarding the change in character of the proceedings "was largely ignored by the Court below."

Petitioners never in their petitions for writ of habeas corpus made the contention (R. 1-9). No complaint was made therein as to the procedural technicalities in what petitioners now choose to denominate as "prosecutions for contempt" (R. 1-9).

It is apparent from petitioners' testimony, their reasons for refusal to answer, and the course of action they took in using habeas corpus instead of appeal remedies, that petitioners were interested only in attacking and stopping the investigative proceedings. They showed no interest in attacking the validity of the "prosecutions for contempt."

They were interested solely in their asserted right to refuse to answer. They were not interested in their rights as "defendants" in a "prosecution for contempt."

They were testing the power of the court to hold the inquisition with the public excluded. They were not testing the power of the court to sentence for contempt without first opening the doors of the court room.

So far as they related to constitutional questions, the burden of petitioners' applications centered around the controversial question of self-incrimination. But legal research quickly revealed that petitioners were faced with this court's holding in *Jack* v. *Kansas*, 199 U. S. 372. Accordingly, petitioners found it necessary to urge other grounds in their oral argument before the Supreme Court of Kansas.

So it was that the primary question before the Supreme Court of Kansas became a question not raised in the applications. That question was whether the statute authorizing the inquisition was limited to the investigation only of liquor and gambling law violations and cases where the accused was a fugitive from justice. The dissent below was confined to this point, set forth in Syllabus 2 by the Court. *In re Ferris*, 175 Kan. 704, 716, 267 P. 2d 190 (R. 173-174, 189). As is apparent from both the opinion and the dissent, this new question belatedly became the major issue before the Court. *In re Ferris*, 175 Kan. 704, 267 P. 2d 190 (R. 173-192). It was a question of statutory construction decided adversely to petitioners by the only court which can pass upon it.

While petitioners failed wholly to rely on the changed character of the proceedings in their writs of habeas corpus, the Kansas court did consider and decide certain issues regarding the sentences as such. It did this even

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though the questions were not properly raised in this habeas corpus proceeding or by the applications in habeas corpus. Those issues were stated by the court as follows:

> "Petitioners *argue* the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel" (*In re Ferris*, 175 Kan. 704, 713, 267 P. 2d 190, R. 185, Italics added).

The question of the secrecy of the so-called "prosecutions for contempt" was not, however, called to the attention of, or discussed by the Kansas court as a constitutional question, either state or federal.

Petitioners' principal reliance is on *Re William Oliver*, 333 U. S. 257. The case was not mentioned by the Kansas court because the question now sought to be raised by petitioners was not before it. In view of the indulgence with which that court treated petitioners' various departures from the issues, it is unbelievable that it deliberately disregarded the *Oliver* case. The vigorous dissent made no reference to *Oliver* or its doctrine. Neither did any one of petitioners' four briefs filed below.

The Supreme Court of Kansas prefaced its discussion of the secrecy question with the following statement of the issue as presented to the Court:

> "Petitioners stoutly contend the *legislative history* of the inquisition statute discloses it was not intended the *inquisition* should be held in secret * * *" (*In re Ferris*, 175 Kan. 704, 712, 267 P. 2d 190, R. 183, Italics added).

As stated in Respondent's Brief In Opposition (5-6), "Of conclusive significance is the discussion by the Kansas

Supreme Court of the Sixth Amendment to the Constitution of the United States and Section Ten of the Kansas Bill of Rights.[1] Both provisions deal, in part, with the right of an accused to a *public* trial. The language dealing with "public trial" was eliminated from the provisions, as quoted by the Court, obviously because it was not material to any issues raised by the petitioners (175 Kan. 710, R. 181). If the Kansas Court had actually been confronted with the issue of whether or not the secrecy of the sentencing violated petitioners' rights under either provision, it is inconceivable that no reference would have been made to the language pertaining to a public trial. Instead, the provisions were examined solely in the light of petitioners' contention that their inability to obtain counsel deprived them of constitutional rights. The Court set forth in its opinion the language of each provision "insofar as material" (175 Kan. 710, R. 181).

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[1]In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to* have the assistance of counsel for his defense. Sixth Amendment to the Constitution of the United States.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; *to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.* No person shall be a witness against himself, *or be twice put in jeopardy for the same offense.* Section Ten of the Kansas Bill of Rights.

The italicized portion of each provision was excluded in quotation by the Kansas Supreme Court (R. 181).

In order to give support to their assertion that the questions urged here were raised below, petitioners now rely on quotations from their brief in the court below as hinting at the federal due process questions now urged (Petitioners' Brief, 22-24).

The quotations contain arguments related solely to the Kansas constitution and statutes. But petitioners now state that a suggestion of denial of federal "due process" was "implicit" in the state question propounded, and that the Kansas Court "might have fairly *inferred*" the federal constitutional question. They admit, however, that "due process" was never mentioned (Petitioners' Brief, 24, Italics added).

The generosity with which the Kansas court explored expanded questions negatives the suggestion that it "might have fairly inferred" the present question to exist. In *Whitney* v. *California*, 274 U. S. 357, 362, this court stated, "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature." In *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, the Court stated, "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The reasoning of this Court in the above case should extend more strongly to a related clause of an entirely different constitution.

Even in their motion for rehearing (R. 192-193) petitioners did not raise the question. The only questions raised in addition to the "Constitutional and Federal ques-

tions heretofore raised" were those going to the power of county attorneys and district judges to grant immunity and the legislative intent regarding such power. This was after the *Oliver* case had been specifically drawn to petitioners' attention (See Reply Brief of Petitioners, 4, 5).

Petitioners presented to the Kansas court in these test cases the ultimate question as to whether anyone could be required to answer questions in such a proceeding. If not, the court had no jurisdiction and petitioners were entitled to their freedom on habeas corpus. Having lost their test case, petitioners now must admit that they were guilty of contempt. But they now insist for the first time that they were not properly sentenced for the offense because their "trial" was not public.

II. Petitioners Are Not Entitled to Relief in Habeas Corpus, Having Failed to Exhaust Their State Remedies by Review.

The record shows, and it is admitted (p. 6 of Petitioners' Brief) that petitioners refused to answer questions. All arguments that they were not required to do so are now abandoned. Hence it must be admitted that they were in direct contempt.

Yet on page 37 of the brief we encounter a factual argument that petitioners were not in contempt. The argument is not properly made in these proceedings.

Petitioners state in their brief (p. 37):

> "* * * It is true that the Supreme Court of Kansas has, in effect, held that the petitioner's contentions were insufficient to justify his refusal to answer the questions propounded. However, that ruling was made in the habeas corpus proceeding, and not in the proceeding which resulted in the petitioner's conviction. * * *"

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The reason that the ruling was not made in the proceeding which resulted in petitioners' conviction was because petitioners failed to appeal to the Supreme Court of Kansas from the order of the court. Kansas provides a complete remedy by means of which a person held in contempt can have the validity of the contempt judgment reviewed and his constitutional rights protected. G. S. Kan. 1949, 20-1205, provides, as follows:

> "That the testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to or by writ of error from the supreme court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the supreme court."

Under this statute, petitioners, though held in direct contempt, could have had complete relief, including the relief now sought. *Bird* v. *Gilbert*, 40 Kan. 469, 19 Pac. 924; *Wallace* v. *Weber*, 134 Kan. 201, 5 P. 2d 855.

Indeed, such a review proceedings would have afforded the only proper forum within which to raise the technical errors now complained of with respect to the so-called "prosecutions for contempt."

This is so because, in Kansas, habeas corpus proceedings by one committed for contempt raise jurisdictional questions only. The statute so providing is G. S. Kan. 1949, 60-2213, which is, in part, as follows:

> "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:
>
> * * * * * * *

> "Third. For any contempt of any court, officer or body having authority to commit; * * *"

See *In re Gambrell*, 160 Kan. 620, 164 P. 2d 122, and *In re Hanson*, 129 Kan. 597, 283 Pac. 659, for interpretations of the statute.

Consequently, petitioners' remedy under Kansas law for the complaints now made was by way of review, not habeas corpus. Under the doctrine of *Edelman* v. *California*, 344 U. S. 357, they should have exhausted that remedy. The Court there stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert* v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906); *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L. R. A. 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below. * * *"

The Kansas Court was without jurisdiction to decide the matter now urged, and the relief now sought could have been denied in that court, had it been sought there, on such adequate state grounds.

The Kansas Court did consider other questions not technically before it, stating:

> "Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decision on technicalities. We shall fully consider petitioners' contentions as now made" (175 Kan. 704, 708, R. 179).

The Kansas court's consideration of other questions called to its attention but not directly within its jurisdiction in habeas corpus proceedings should not obscure and

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does not detract from the principle of law as stated in *Woods* v. *Neirstheimer*, 328 U. S. 211, 214:

> "From our investigation of the law of the State of Illinois we conclude that the denials of the applications in this case could have rested, and probably did rest, on the ground that habeas corpus is not the proper remedy in cases such as the one before us. For this reason we are without power to review the judgments * * * and the writs of certiorari must be dismissed."

Denial of petitioners' applications, even if construed as broad enough to include the questions now raised, could have rested, with respect to such questions, on the adequate state ground of lack of jurisdiction.

III. Petitioners Were Not Deprived of Any Rights Guaranteed to Them by the Due Process Clause of the Fourteenth Amendment.

A. The Presiding Judge Was at All Times Acting in a Judicial Capacity.

The Kansas inquisition statute (Appendix) supplements the traditional grand jury inquiry into the causes of crime and the necessity of beginning criminal prosecution. Examination of the statute is necessary to an understanding of the proceedings which gave rise to petitioners' commitments for contempt. It will also serve to correct the erroneous statement in petitioners' brief (16-17) that the statute here involved differs only in its terminology from the Michigan statute considered by the Court in *Re William Oliver*, 333 U. S. 257.

For certain specified crimes, not relevant here, an inquisition may be commenced and conducted by the county attorney without judicial supervision; for the investigation of all other crimes the proceeding must also be started

by the county attorney. In such other cases, he must, however, file a written statement setting forth the purpose of the inquisition. A judicial officer must attend and supervise the examination of witnesses. In all cases the county attorney determines from the evidence obtained whether criminal proceedings should follow.

Witnesses are granted complete immunity from prosecution for any transaction concerning which they are compelled to testify. Failure of a witness to answer questions, when ordered by the judge to do so, is punishable as contempt by the judge. Constitutional approval for this phase of the statute was given in *Jack* v. *Kansas*, 199 U. S. 372.

There are substantial points of difference between the Kansas and Michigan statutes. In Kansas there is no amalgamation of investigatory and judicial authority in the judge. The Kansas judge is not and may not become a roving grand jury. Unlike the Michigan judge, the Kansas judge does not begin the investigation, he does not examine the witnesses and he does not decide whether a complaint should be filed. In addition, the Kansas statute requires that testimony be recorded and preserved. And, it is the duty of the judge under the inquisition statute to confine interrogation to questions relevant to the inquiry. *The State* v. *Jack*, 69 Kan. 387, 76 Pac. 911.

The court below emphasized the judicial character of the presiding judge. Kansas is well aware that judicial and executive power cannot be exercised at one time by the same person, and that an inquisitor cannot punish for contempt. *In re Sims*, 54 Kan. 1, 37 Pac. 135. The *Sims* case shows that Kansas, unlike Michigan, long ago anticipated and prevented the vices found present in the *Oliver* case.

The record here reveals that the judge acted solely in his judicial capacity. He performed the function of fully, completely and correctly advising petitioners as to their rights.

Petitioners argue (Petitioners' Brief, 18-19) that the judge has no discretion and that his functions are ministerial. This is contrary to the authority vested in him by the statute as interpreted by the Supreme Court of Kansas. In addition, the record itself shows exercise of judicial discretion here. Petitioners' characterizations of the judge as an "inquisitor" has no basis in fact or law.

So far as the judge is concerned, the Kansas statute differs from the traditional grand jury procedure only in requiring that the judge actually be present while witnesses are examined. If under this procedure the recalcitrance of a witness becomes contempt *in facie curiae* because of the presence of the court, the statute also provides a witness with protections resulting from that presence which he is not afforded in grand jury proceedings.

Long ago this Court held that the due process clause of the Fourteenth Amendment does not prohibit deviation by the states from the common law modes of investigating criminal conduct, and that the traditional grand jury system may be altered or abolished without infringing due process. *Hurtado* v. *California*, 110 U. S. 516. Since the federal judicial power may be invoked, consonant with due process, to compel answers asked a witness by an administrative agency, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, it cannot be urged that petitioners' refusal to testify in a state proceeding to investigate crime could not be properly punished by the judicial power.

The authority of the county attorney to inquire into the causes of acts of violence which disrupt his community

cannot be questioned, and if citizens refuse to give testimony during such an inquiry, they are surely, as in grand jury proceedings, punishable by judicial power. Here petitioners were punished for contempt because they refused to testify during such an investigation, despite a judicial order to answer the questions asked by the county attorney.

Punishment by the judiciary is the customary mode of compelling testimony from recalcitrant grand jury witnesses.

> "The grand jury being merely an appendage of the court, the refusal by a witness to answer questions put by them is a contempt of the court by whose order the grand jury was impaneled." Rapalje, Contempt, Sec. 67, p. 83.

See also, *Hale* v. *Henkel*, 201 U. S. 43, and *Camarota* v. *United States*, (C. A. 3rd) 111 F. 2d 243, certiorari denied 311 U. S. 651. Similarly, the judicial contempt power is properly exercised to compel testimony for investigating agencies unknown to the common law, such as the Interstate Commerce Commission.

> "It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress, in execution of a power granted by the Constitution." *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 487.

B. Contempt Committed in the Face of the Court, Personally Observed by the Presiding Judge, Is Punishable Without Any of the Incidents of Trial.

It is admitted in this proceeding that the petitioners refused to testify during the inquisition proceeding. It

cannot be denied that their refusal occurred in the face of the court and was personally observed by the presiding judge.

Under Rule 42(a) of the Federal Rules of Criminal Procedure:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The procedure prescribed by the Rule was recently approved by this Court in the case of *Sacher* v. *United States*, 343 U. S. 1, wherein it was noted that the Rule "was intended to make more explicit 'the prevailing usages at law' by which the statute has authorized punishment of contempts" (343 U. S. 7). The rule follows the traditional statements describing the summary contempt power as arising from personal observation of the offensive conduct by the court. Given the contemptuous conduct and its observation by the court, sentencing may follow automatically—nothing need intervene between the occurrence of the act and imposition of sentence. As to this type of contempt, the Court has stated:

> "* * * But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the Government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply

> a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination * * *'" *Ex parte Terry*, 128 U. S. 289, 308.

Other statements of the principle are found in *Ex parte Robinson*, 86 U. S. 19 Wall. 505; *Re Savin*, 131 U. S. 267; and *Fisher* v. *Pace*, 336 U. S. 155.

Rule 42(a) and the foregoing cases authorize summary punishment for contempt when the conduct occurs in the presence of the court and is observed by the judge. Occasionally, direct contempt is said to be contempt committed in "open court." Rapalje, in defining direct contempt, interchanges the phrases "*in facie curiae*"[1] and "open court."[2] It is submitted that both phrases are used to designate conduct occurring while a judge is performing the duties of his office as distinguished from conduct observed by a judge while he is not acting as a governmental official, and that the absence of the public when the contempt is committed does not affect the need for the power or the propriety of its use.

C. A Sufficient Ground for the Exercise of the Contempt Power Is Conduct Which Obstructs the Administration of Justice, Such As Refusal to Obey an Order of the Court.

As they must, if they are to prevail, petitioners attempt to show (1) that no need for the summary con-

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[1]Rapalje, Contempt, Sec. 1, pp. 1-2.

[2]Op. cit., Sec. 111, p. 150.

tempt power exists in the absence of public attendance at a proceeding and (2) that they have been deprived of constitutional rights because the public had no opportunity to observe their commitments. The first contention is dealt with here.

Since their inception federal courts have possessed power to punish summarily as contempt conduct in the presence of the court which obstructs the administration of justice or is disobedience or resistance to an order of the court. The present grant of Federal statutory contempt power is to the same effect.

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." June 25, 1948, c. 645, 62 Stat. 701 (18 U. S. C. 401).

The current act is substantially the same as the Act of 1831.

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831. 4 Stat. at L., 487" * * *

"The Act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and, 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 509-511.

The powers described in the statutes and approved by the Court clearly include disobedience to court orders. For disobedience of orders of the court petitioners in this proceeding were punished. They were also obstructing the administration of justice. Argument seems unnecessary to establish that the effective functioning of court proceedings, such as those involved here, may be obstructed although the public do not observe the conduct. Any investigation proceeding is obstructed, to say the least, when witnesses refuse to testify in the face of a court order to do so.

Petitioners' contention that the summary power to punish for contempt may only be exercised to forestall demoralization of the court's authority before an attending public has recently been rejected by this court. *Sacher* v. *United States*, 343 U. S. 1. In the *Sacher* case, it was argued on behalf of the contemnors that the summary power, as defined in *Re William Oliver*, 333 U. S.

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257, could not be invoked except when its immediate exercise was necessary to forestall demoralization of court proceedings before the public. Nevertheless, the court said:

> "We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge * * *" (343 U. S. 9).

Thus the Court has not confined the use of summary power to occasions when proceedings before the public must halt unless the power is immediately exercised. By statute and common law, the disobedience of court orders is made a proper matter for punishment by the contempt power. It is submitted that neither the language of the Constitution or the history of contempt proceedings require that the contemnor be sentenced before the public.

D. Public Attendance Has Never Been a Prerequisite to and Can Have No Effect on the Exercise of the Contempt Power.

In the *Terry* case an adjudication of direct contempt was made while the contemnor was absent from the court room. It appears that the court did nothing more than prepare and file an order finding the contemnor guilty and fixing his punishment. While the offensive conduct may, or may not, have been observed by the public, there is nothing to indicate that the public observed the imposition of the sentence by the court. As in the instant case,

however, the written order was made public by filing of record.

If, as the *Terry* case and Rule 42(a) state, an adjudication of direct contempt consists only of the preparation and filing of a written order by the Court which observed the conduct, what benefit to the contemnor arises from public observance of the proceeding? The public need have no opportunity to see the offender condemned before the court.

> "The precise question, therefore, to be now determined is whether the retirement of the petitioner from the court room, into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment, without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment." *Ex parte Terry*, 128 U. S. 289, 311.

This court has held that the power may be exercised months after the offensive conduct has occurred. *Sacher* v. *United States*, 343 U. S. 1.

It is impossible to discern any benefit to the contemnor arising from public observation of punishment for prior conduct at a time when no evidence is offered and no defense is permitted. And how is public influence felt

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when the court simply prepares an order or certificate—other than in the judge's knowledge that, after filing, his order will be known?

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." But this Court has stated:

> "While contempt may be an offense against the law, and subject to appropriate punishment, certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis*, and not 'criminal prosecutions' within the 6th Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104-105.

The claim that the amendment entitles a contemnor to a trial by jury was squarely rejected in *Eilenbecker* v. *District Court*, 134 U. S. 31, 38:

> "It will thus be seen that even in the Act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party to any lawful writ, process, order, rule, decree or command of said court. This Statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the States by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders was ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts, was due process of law at the time the Fourteenth Amendment of the Federal Con-

> stitution was adopted, and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts."

Petitioners' reference to the words "open court" as the equivalent of "public hearing" in their discussion is not warranted by the cases. The cases clearly show that the words "open court" refer to the presence of a judicial officer acting as such and come much nearer to meaning "*in facie curiae.*" The presence or absence of the public does not affect the use of the summary power.

In *Ex parte Nugent*, (C. C. D. C.) Fed. Case No. 10,375, 1 Hayw. & H. C. C. 287, 1 Am. L. J. 107, 1 Brunner's Collected Cases 296, the United States Circuit Court for the District of Columbia held that the United States Senate could pronounce judgment in secret session for a contempt consisting of refusal to answer questions, the contempt also having taken place in the same secret session. The court in that case stated:

> "It was also contended in argument that although the Senate might hold secret sessions, they could not in secret session punish a man for a contempt. The court, however, cannot perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session." *Ex parte Nugent*, 1 Brunner's Collected Cases 296, 325.

The *Oliver* case, upon which petitioners seem to rest their entire argument, has no factual resemblance to the instant proceeding. The facts in that case show summary commitment for conduct which certainly was not a direct contempt of court, if it was contempt of any kind. The punishing authority weighed and evaluated testimony and proceeded upon facts not within his knowledge to convict

for "false and evasive swearing." He necessarily decided the issuable fact of the truth or falsity of the testimony. The proceedings constituted, in effect, a trial for perjury. This was recognized by this Court when it stated:

> "* * * The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The Terry Case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the Terry Case only if the judge there had not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify" (333 U. S. 257, 277).

The case at bar falls strictly within the facts of the *Terry* case as distinguished in the above language. The judge here could correctly detect failure to answer "from simply listening to the witness testify." He could detect contempt "from merely observing a witness and hearing him testify."

As in the *Nugent* case, the contempt in the case at bar was the refusal to answer questions. The contemptuous nature of the conduct at bar was also as apparent as the

assault in the *Terry* case. Consideration of nothing except petitioners' unequivocal conduct seen and heard by the court was necessary.

The officer who imposed sentence in the *Oliver* case was vested with powers of nonjudicial character, and it seems reasonable to conclude that when the offensive conduct occurred it was not in the presence of a "court." Until sentence was pronounced, the role of the "judge" had been that of an investigator. We fail to see how, in the light of the facts before the Court, the decision in the *Oliver* case has any application to an admitted direct contempt personally observed by a presiding judge.

If public trials afford protection to the accused it must largely result from notice of trial to the public as well as the accused. But no notice of intention to proceed and no opportunity to defend are granted a contemnor guilty of direct contempt. *Ex parte Terry, supra.*

In both the *Terry* case and here the judgments of contempt were subjected to public scrutiny when filed of record. Petitioners here have had their commitments examined upon a full transcript by an appellate court. They were free, also, to obtain further review by way of appeal, if they had wished. The Kansas provisions for appellate review of direct contempt are far more liberal than the common law rule[1] which precluded any inquiry beyond the jurisdiction of the sentencing court.

Power to proceed summarily is undoubtedly subject to abuse, but we believe the record fails to show any misuse of power in this proceeding. Concerning the judicial contempt power, this Court has said, through Mr. Justice Storey:

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[1]Rapalje, Contempt, Sec. 141, pp. 198-199.

"Wherever power is lodged, it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice * * *." *Ex parte Kearney*, 20 U. S. 7 Wheat. 38, 45.

CONCLUSION.

The questions presented here were not raised in petitioners' applications for writs of habeas corpus, were not briefed or argued by them, were not raised in their applications for rehearing or otherwise called to the attention of the court by them, and were not decided by the Kansas court.

Petitioners are now attempting to set aside a sentence in habeas corpus proceedings when a complete remedy by review of the technical errors urged in the contempt proceedings was afforded them by Kansas law. Petitioners failed to exhaust that remedy.

For the above reasons, this court has no jurisdiction over this cause, and the petitions for writ of certiorari should be dismissed.

No substantial rights of the petitioners under the Fourteenth Amendment to the Constitution of the United

States were affected. For this reason, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

HAROLD R. FATZER,
Attorney General, State of Kansas,
Capitol Building,
Topeka, Kansas,
WARNER MOORE,
County Attorney, Sedgwick County, Kansas,
CHARLES D. ANDERSON,
Deputy County Attorney, Sedgwick County, Kansas,
PAUL R. KITCH,
DONALD R. NEWKIRK,
DALE M. STUCKY,
Special Deputy County Attorneys,
Sedgwick County, Kansas,

By .....,
Attorneys for Respondent.

Date .....

APPENDIX.

G. S. Kansas 1949, 62-301.

"If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him, at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state. Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county, and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and re-

turned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or any refusal to be sworn as a witness or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment. If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued

for the arrest of such person or persons as in other criminal cases. No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state."

G. S. Kansas 1949, 60-2213.

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: * * *

"Third. For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt upon proceedings to enforce the remedy of a party is not included in any of the foregoing specifications."

G. S. Kansas 1949, 20-1203.

"That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon."

G. S. Kansas 1949, 20-1205.

"That the testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to or by writ of error from the supreme court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the supreme court."

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No. 179. COURTNEY ET AL. *v.* SCHROEDER. Certiorari, 348 U. S. 854, to the Supreme Court of Kansas. Argued February 4, 1955. Decided February 7, 1955. *Per Curiam:* The judgment is reversed and the case is remanded for proceedings not inconsistent with the opinion of this Court in *In re Oliver*, 333 U. S. 257. *Payne H. Ratner* argued the cause for petitioners. With him on the brief was *Keith Eales*. *Dale M. Stucky* argued the cause for respondent. With him on the brief were *Harold R. Fatzer*, Attorney General of Kansas, and *Warner Moore*. Reported below: 175 Kan. 704, 267 P. 2d 190.